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No. A-909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

and

BOARD OF EDUCATION OF THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

and

ALLAN G. BARCLAY, GERALD K. BRAZNELL, AND GERALD B. HANSEN, DIRECTORS OF THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

Petitioners,

v.

TERRI ANN MIENER, By and through her next friend and parent, Clyde J. Miener,

and

STATE OF MISSOURI, *et al.*,

and

THOMAS E. SMITH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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July, 1982

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QUESTIONS PRESENTED

1. Whether the Court of Appeals contravened relevant decisions of this Court in holding that a special public school district which receives federal funds under the Education for All Handicapped Children Act of 1975 (EAHCA) can be sued for damages under the implied right of action in Section 504 of the Rehabilitation Act of 1973 and under the Civil Rights Act of 1871, 42 U.S.C. § 1983, by a handicapped child alleging wrongful exclusion from the district's programs, when no recovery of damages is possible under the express remedy provided in EAHCA.

2. Whether the Court of Appeals correctly applied this Court's decisions in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and *Mt. Healthy City School District* v. *Doyle*, 439 U.S. 274 (1977), in holding that a special school district which receives federal funds under EAHCA and whose sole functions are the education of handicapped children and the providing of vocational education does not share the State's Eleventh Amendment immunity from suit for damages regarding the district's provision of education to the handicapped.

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ALLAN G. BARCLAY, GERALD K. BRAZNELL, AND GERALD B. HANSEN, DIRECTORS OF THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

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TERRI ANN MIENER, By and through her next friend and parent, Clyde J. Miener,

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THOMAS E. SMITH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Special School District of St. Louis County, Missouri, the Board of Education of the Special School District, and Allan G. Barclay, Gerald K. Braznell, and Gerald B. Hansen, Directors of the Special School District, pray that a writ of certiorari issue to review the judgment and opinion of

the United States Court of Appeals for the Eighth Circuit entered on February 4, 1982, affirming in part and reversing and remanding in part the Orders of the United States District Court for the Eastern District of Missouri entered on January 25, 1980, and September 19, 1980. Petitioners believe that on the two questions presented herein, the Eighth Circuit's judgment was in conflict with decisions of this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals is published at 673 F.2d 969 (8th Cir. 1982), and is reprinted herein as Appendix A. The Memoranda of the District Court of January 25, 1980, and September 19, 1980, are published, respectively, at 498 F. Supp. 944 (E.D. Mo. 1980) and 498 F. Supp. 949 (E.D. Mo. 1980), and are reprinted herein as Appendixes B and C.

JURISDICTION

The judgment of the Eighth Circuit of which review is sought was entered on February 4, 1982. On April 27, 1982, Mr. Justice Blackmun extended until June 4, 1982, the time within which Petitioners could seek a writ of certiorari. Also on April 27, 1982, for extraordinary reasons, the Eighth Circuit ordered that Petitioners might have until May 11, 1982, to file a petition for rehearing. (The grounds on which the Eighth Circuit's order was sought were described in detail in the Application for Extension of Time Within Which to File a Petition for Writ of Certiorari which Petitioners mailed to Mr. Justice Blackmun on April 24, 1982.) Pursuant to the permission granted by the Eighth Circuit, Petitioners submitted a Petition for Rehearing on May 11, 1982, and this Petition was denied on May 20, 1982. Thereupon, under Supreme Court Rule 20.4, the ninety-day period for filing a petition for certiorari began to run anew and superseded the extension previously allowed by Mr. Justice Blackmun.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The following constitutional provision, statutes, and regulations involved in this case are set out in Appendix D:

U. S. Constitution Amendment XI

20 U.S.C. §1401(18), (19) (1976)

20 U.S.C. §1412(1), (2)(A), (B), (C), (6) (1976)

20 U.S.C. §1414(a)(1)(A), (C)(ii), (D), (5) (1976)

20 U.S.C. §1414(d) (1976)

20 U.S.C. §1415 (1976)

29 U.S.C. §794 (Supp. IV 1980)

34 C.F.R. §300.360(a), (b) (1981)

34 C.F.R. §300.512 (1981)

34 C.F.R. §300.600 (1981)

Mo. Rev. Stat. §162.675(2), (3), (4) (1978)

Mo. Rev. Stat. §162.700(1), (3) (1978)

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Mo. Rev. Stat. §162.890 (1978)

STATEMENT OF THE CASE

This action was commenced on August 27, 1979, by Terri Ann Miener, a severely handicapped 17 year old girl. At the time of the Complaint, Plaintiff was and had been for over two years a voluntary resident of the Youth Center of the St. Louis State Hospital, located in the City of St. Louis. Suing through her father, Clyde J. Miener, a resident of St. Louis County,[1] Plaintiff sought declaratory, injunctive, and monetary relief for alleged violations of her constitutional, statutory, and common law rights. Defendants named in the suit were the State of Missouri and its governor, the State department of education and its commissioner and assistant commissioner, the State department of mental health and its commissioner and acting director, two local officials of the State department of mental health (who were sued both individually and in their official capacities), and Petitioners.

Petitioner Special School District of St. Louis County, Missouri, was created in 1957 by the voters of St. Louis County, pursuant to legislation authorizing the establishment of special districts to educate and train the handicapped children residing in certain populous counties. Act of June 18, 1957, § 1, 1957 Mo. Laws 416 (current version at Mo. Rev. Stat. § 162.815(1978)). In 1965 the St. Louis County voters expanded the responsibilities of the Special District to include the providing of vocational education to County students. During the 1980-81 school year, 14,522 handicapped students and 2,205 vocational education students were enrolled in programs of the Special District. Petitioner has received federal funds under the Education for All Handicapped Children Act of 1975 (EAHCA), 20 U.S.C. §§ 1401, 1411-1420 (1976 & Supp. IV 1980), every year since the 1977-78 school year.

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[1] The City of St. Louis and St. Louis County are entirely separate geographic and political subdivisions of the State of Missouri. *See* Mo. Rev. Stat. § 46.040 (1978).

The Complaint in this case contained four counts, only the first two of which named Petitioners as defendants. Count I alleged that all Defendants had violated Plaintiff's right to a free appropriate public education under EAHCA. In Count II, Plaintiff alleged that the State educational Defendants and Petitioners had violated her due process and equal protection rights under the Fifth and Fourteenth Amendments of the United States Constitution by refusing to allow her to participate fully in the special education program operated by Petitioners. Plaintiff sought a preliminary and permanent injunction requiring Defendants to admit her to the programs of the Special School District. Count III alleged that the State and local mental health Defendants had discriminatorily denied Plaintiff's EAHCA right to a full education, in violation of her due process rights under the Fifth and Fourteenth Amendments, and, on the basis of Plaintiff's handicaps, had denied her equal access to facilities and programs, especially educational programs, open to others similarly situated, in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. IV 1980). Preliminary and permanent injunctions against future denials of equal access were sought. Count IV asserted a pendent claim for damages against the two local officials of the mental health department individually for injuries suffered by Plaintiff while in the care and custody of the St. Louis State Hospital.

In addition to the injunctive relief noted above, Plaintiff prayed for an award of $50,000.00 damages against all Defendants for deprivation of her civil and constitutional rights; for damages of $474,358.00 against the State, the two State departments, and the Special School District for violation of Plaintiff's statutory and civil rights to a full and adequate education; and for an injunction requiring the State and the two State departments "to provide prospective relief in the form of compensatory services to overcome the effects of any past denial of special educational services."

Discovery in this case proceeded apace, and it soon became apparent that the Special District's only contacts with Plaintiff prior to the suit had been the performance of evaluations on two occasions, participation of Special District personnel in the preparation of an individualized educational program (IEP) for Plaintiff in August, 1978, and the providing of limited "homebound" services to Plaintiff for a short time while she was a resident of the Youth Center. The Special District had never refused a request by Mr. Miener to provide educational services for his daughter.

On December 20, 1979, Petitioners filed two motions for summary judgment, one regarding Petitioners' liability for damages and the other regarding Petitioners' duties to Plaintiff. On January 25, 1980, the District Court granted in part the other Defendants' motions to dismiss, holding that (1) there was an implied private right of action to enforce Section 504 of the Rehabilitation Act, but no implied action for damages under the section, (2) the express remedy set out in Section 1415 of EAHCA was the sole remedy for violation of the Act and Congress had not implied a private action for damages, and (3) the discrimination alleged in Counts II and III of the Complaint was not the kind of "invidious discrimination" necessary to support a claim for damages under 42 U.S.C. § 1983. *Miener* v. *Missouri*, 498 F.Supp. 944 (E.D. Mo. 1980). On March 14, 1980, the District Court denied Petitioners' two motions for summary judgment as moot.

On April 23, 1980, the Court adopted a stipulation of the parties, pursuant to which Plaintiff dismissed with prejudice all remaining claims except the claim for compensatory education and the pendent tort claim.

On September 4, 1980, Petitioners filed another motion for summary judgment, contending that, because Plaintiff was a resident of the City of St. Louis, Petitioners had no obligation to her under federal or State law, except to contribute toward

her education an amount determined by State laws. In its decision of September 19, 1980, the District Court dismissed Plaintiff's two remaining claims. The Court held that the claim for compensatory education, although phrased as a prayer for injunctive relief, was in essence a claim for damages and would therefore be dismissed in accordance with the Court's Order of January 25, 1980. Since all federal claims had been dismissed, the pendent tort claim was also dismissed. *Miener* v. *Missouri*, 498 F.Supp. 949 (E.D. Mo. 1980). Petitioners' motion for summary judgment was held moot.

Plaintiff appealed, contending that the District Court had erred in (1) finding that a private action for damages was not implied under Section 504 of the Rehabilitation Act, (2) finding that a private action for damages was not implied under Section 1415(e)(2) of EAHCA, (3) dismissing Plaintiff's 42 U.S.C. § 1983 claim, and (4) characterizing Plaintiff's claim for compensatory education as a damages claim barred by the Eleventh Amendment.[2]

On Februarv 4, 1982, the Eighth Circuit delivered its opinion, affirming in part and reversing and remanding in part the two Orders of the District Court dismissing Plaintiff's claims. The Court of Appeals affirmed the court below on the absence of an action for damages under EAHCA, but only after determining that the "appropriate relief" that a court is authorized to grant under Section 1415(e)(2) of EAHCA does not include

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[2] For some reason, both Plaintiff and the Eighth Circuit thought that the District Court had dismissed the compensatory education claim on Eleventh Amendment grounds. *See Miener* v. *Missouri*, 673 F.2d 969, 973, 980 (8th Cir. 1982); Brief of Appellant at 34, *id.* Although the District Court did include a quotation from *Edelman* v. *Jordan*, 415 U.S. 651 (1974), in its Memorandum of September 19, 1980, the Memorandum makes it perfectly clear that the reason for the dismissal was that the compensatory education claim, being a claim for damages, fell within the scope of the Court's earlier decision on January 25, 1980.

monetary relief. *Miener* v. *Missouri*, 673 F.2d 969, 979-80 (8th Cir. 1982). In regard to the implication of a private action for damages under Section 504 of the Rehabilitation Act, however, the Eighth Circuit found that the regulations thereunder provided only administrative sanctions against recipients of federal funds for acts of discrimination and did not afford an adequate remedy to the handicapped individuals who were objects of the discrimination. Therefore, the Court held that a private action for damages was implied in Section 504 to vindicate the individual rights that Congress had created. *Id.* at 977-78.

On the prayer for compensatory educational services, the Court of Appeals agreed with the District Court that this was a claim for damages. The Eighth Circuit chose, however, to expand the District Court's purported consideration of the Eleventh Amendment to all defendants and all claims in the case. The Court concluded that the State, the two State departments, and the officials thereof sued in their official capacity were immune from suit for damages by virtue of the Amendment. Largely in reliance on *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274, 280 (1977), the Eighth Circuit held that Petitioners did not share the State's immunity under the Amendment. Therefore, the Court "reverse[d] the dismissal of appellant's cause of action for damages *under the Rehabilitation Act* against these defendants." 673 F.2d at 983 (emphasis added). The Court "also reverse[d] the dismissal of appellant's § 1983 cause of action as asserted against the various Special School District defendants," *id.*, and remanded that claim for reconsideration in light of *Maine* v. *Thiboutot*, 448 U.S. 1 (1980).

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Contravened Relevant Decisions Of This Court In Holding That A Special Public School District Which Receives Federal Funds Under The Education For All Handicapped Children Act Of 1975 (EAHCA) Can Be Sued For Damages Under The Implied Right Of Action In Section 504 Of The Rehabilitation Act Of 1973 And Under 42 U.S.C. § 1983 By A Handicapped Child Alleging Wrongful Exclusion From The District's Programs, When No Recovery Of Damages Is Possible Under The Express Remedies Provided In EAHCA.

Discussion of this issue must begin with an examination of the Eighth Circuit's holding that a private action for damages is not available under the Education for All Handicapped Children Act of 1975 (EAHCA). The Court's analysis of this question properly focused on Section 1415(e)(2) of the Act, which provides:

> Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant *such relief as the court determines is appropriate.*

20 U.S.C. § 1415(e)(2) (1976) (emphasis added). The Court defined the issue as whether Congress intended the phrase "such relief as the court determines is appropriate" to include an award of damages. *Miener* v. *Missouri,* 673 F.2d at 979.

Relying on the reasoning of the Seventh Circuit in *Anderson* v. *Thompson*, 658 F.2d 1205, 1210-13 (7th Cir. 1981), the Court observed that "[t]he provision for suit in district court caps an entire sequence of procedures aimed at ensuring proper placements and programs for handicapped children," and given this context, "appropriate relief was generally intended to be restricted to injunctive relief, within which the district judge would have wide latitude to fashion an individualized educational program for the child." 673 F.2d at 979. The Eighth Circuit found "little support for a damage remedy" in the legislative history of the Act, *id.*, and the *Anderson* court found that "the overriding congressional concern was meeting the needs of handicapped children" and that "Congress was also concerned about the lack of money available for education," 658 F.2d at 1212. The Seventh Circuit also observed that it would not be good policy to penalize a school district which was attempting in good faith to provide an appropriate education to a handicapped child if it later turned out that a different program should have been provided. *Id.* at 1213. Perceiving that "educational programs for the handicapped will suffer if school officials, for fear of exposing themselves to monetary liability for incorrect placements, hesitate to implement innovative educational reforms," the Seventh Circuit concluded that "implying a general damage remedy would hinder rather than help the very children for whose benefit the statute was enacted." *Id.* (footnote omitted). For similar reasons, the Eighth Circuit held that monetary relief was not available under Section 1415(e)(2) of EAHCA. 673 F.2d at 979.

The Eighth Circuit in the present case and the Seventh Circuit in *Anderson* thus concluded that Congress did not intend a handicapped child or his parent to be able to recover damages from a provider of special education for any grievance that could be handled through the procedures established in Section 1415. The scope of those procedures is defined in Section 1415(b)(1), which provides in part as follows:

The procedures required by this section shall include, but shall not be limited to—

. . . .

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) *refuses to initiate* or change,

the identification, evaluation, or educational placement of the child or *the provision of a free appropriate public education to the child;*

. . . .

(E) an opportunity to present complaints with respect to *any matter relating to* the identification, evaluation, or educational placement of the child, or *the provision of a free appropriate public education to such child.*

20 U.S.C. § 1415(b) (1976) (emphasis added). The filing of such a complaint initiates the hearing and court procedures described at length in the remainder of Section 1415. In the present case, the gravamen of Plaintiff's Complaint insofar as Petitioners are concerned is that she was wrongfully excluded from the special education programs of the Special School District. Such a complaint clearly falls within the above-emphasized statutory language of Section 1415(b)(1)(E), as amplified in Section 1415(b)(1)(C). Thus, Plaintiff's grievance was of the type which Congress intended to be resolved through the procedures of Section 1415 and which Congress did *not* intend to eventuate in a possible damages award.

By holding that the present Plaintiff can bring an implied action for damages against Petitioners under Section 504 of the Rehabilitation Act, the Eighth Circuit has made possible wholesale circumvention of the legislative intent which the Court itself found to be expressed in Section 1415 of EAHCA. The relevant part of Section 504 provides as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794 (Supp. IV 1980). The Eighth Circuit's holding would allow any handicapped child or his parent who was dissatisfied with the child's IEP to bring an action for damages under Section 504 by alleging that because of the difficulty of dealing with the child's handicap, the provider of special education had intentionally formulated an IEP that did not address the unique nature of the handicap and had thus denied the child the benefits of a public education. This possibility is not at all remote or far-fetched. *See, e.g., Georgia Ass'n of Retarded Citizens* v. *McDaniel.* 511 F. Supp. 1263, 1279-81 (N.D. Ga. 1981) (alternative holding) (statewide practice of not providing special educational services to handicapped children for more than regular 180-day school year violated Section 504 by preventing individual consideration of needs of each handicapped child). *See also Tatro* v. *Texas,* 625 F. 2d 557, 564 (5th Cir. 1980).

The Eighth Circuit's holdings in the present case are necessarily premised on findings that the intent of Congress in 1973 when it passed the Rehabilitation Act was that a handicapped child or his parent be able to sue a school district for damages for wrongs relating to the provision of special education, but that in 1975 when Congress enacted EAHCA its intent was the precise opposite. If such a change in congressional intent actually occurred, then the Eighth Circuit should have restricted Plaintiff to her remedy under Section 1415 of EAHCA, since that remedy was the more recently enacted, was more specifically directed towards the education of handicapped children, and was provided by Congress, not judicially created.

Decisions of this Court over the past decade provide ample precedent for limiting the scope of a judicially implied action when necessary to prevent evasion or negation of the conditions, substantive or procedural, that Congress has included in a corresponding express right of action. In *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), the Court upheld the *Birnbaum* rule, which provides that only actual purchasers or sellers of a security can bring a (judicially implied) private action for damages under Section 10(b) of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. § 78j(b) (1976), and Rule 10b-5 issued thereunder, 17 C.F.R. § 240.10b-5 (1981). As one step in its reasoning the Court noted that the principal express private remedies which Congress created contemporaneously with Section 10(b) in the Securities Act of 1933 (1933 Act) and in the 1934 Act were all limited to purchasers or sellers of securities. The Court commented that

> [i]t would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.

Id. at 736 (footnote omitted).

This Court employed a similar step in its reasoning in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), in holding that an element of the implied private action under Section 10(b) and Rule 10b-5 was scienter—*i.e.* intent to deceive, manipulate, or defraud—on the part of defendant. Noting that the express provisions in the 1933 and 1934 Acts which impose civil liability on the basis of defendant's mere negligence were "subject to significant procedural restrictions not applicable under § 10(b)," *id.* at 208-09 (footnote omitted), the Court drew the following conclusion:

> [T]hese procedural limitations indicate that the judicially created private damages remedy under §10(b)—which has no comparable restrictions—cannot be extended, con-

> sistently with the intent of Congress, to actions premised on negligent wrongdoing. Such extension would allow causes of action covered by §§11, 12(2), and 15 [the sections expressly premising liability on negligence] to be brought instead under §10(b) and thereby nullify the effectiveness of the carefully drawn procedural restrictions on these express actions.

Id. at 210 (footnotes omitted). The issues in *Blue Chip Stamps* and *Hochfelder* are closely analogous to the issue in the present case, and the holdings in those cases indicate that the Eighth Circuit should not have allowed Plaintiff to evade the limitation of the *express* remedy under Section 1415 of EAHCA to injunctive relief by bringing the same claim against Petitioners by way of an *implied* action for damages under Section 504.

The same principle was illustrated in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979), in which this Court found that no private right of action was implied in the reporting and record keeping requirements of Section 17(a) of the 1934 Act, 15 U.S.C. § 78q(a) (1976). Considering the express remedy provided in Section 18(a) for misrepresentations in filed reports, the Court stated as follows:

> [W]here the principal express civil remedy for misstatements in reports created by Congress contemporaneously with the passage of §17(a) is by its terms limited to purchasers and sellers of securities, we are extremely reluctant to imply a cause of action in §17(a) that is significantly broader than the remedy that Congress chose to provide.

442 U.S. at 574.

In at least two cases where an express remedy for violation of a statute was particularly detailed and comprehensive, comprising both administrative and judicial proceedings, this Court has held that the express provision constitutes the exclusive private

remedy, preempting all more general remedies, express or implied. In *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), a federal employee alleging racial discrimination had filed suit in federal district court more than 30 days after receiving notice of final agency action, and thus failed to comply with Section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e—16(c) (1976). This Court affirmed the dismissal of the complaint on the grounds that Section 717 "provide[d] the exclusive judicial remedy for claims of discrimination in federal employment." 425 U.S. at 835. Examining the remedy provided by Congress in Section 717, the Court concluded as follows:

> The balance, completeness, and structural integrity of §717 are inconsistent with the petitioner's contention that the judicial remedy afforded by §717(c) was designed merely to supplement other putative judicial relief. . . . *[U]nlike these other supposed remedies, §717 does not contemplate merely judicial relief. Rather it provides for a careful blend of administrative and judicial enforcement powers.* . . . The crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated "by the simple expedient of putting a different label on [the] pleadings." *Preiser* v. *Rodriguez*, 441 U.S. 475, 489-490 (1973). It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.

Id. at 832-33 (footnote omitted; emphasis added). It was also noted that "[i]n a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies." *Id.* at 834.

Petitioners submit that the preceding quotation from *Brown* is directly applicable in its entirety to the present case. In *Board of Education of the Hendrick Hudson Cent. School Dist.* v. *Rowley*, No. 80-1002, slip op. at 28-29 (U.S. June 28, 1982), this Court found that the "elaborate and highly specific procedural

safeguards embodied in § 1415" of EAHCA were seen by Congress as the prime means of ensuring that each handicapped child receive a "free appropriate public education." Like Section 717 of the Civil Rights Act, Section 1415 of EAHCA contains a "careful blend of administrative and judicial" proceedings, beginning with an impartial due process hearing conducted by the local, intermediate, or State educational agency, continuing with an appeal to the State agency if the initial hearing was held at the local or intermediate level, and culminating in a civil action in State or federal court and appeals therefrom. All hearings are to be conducted by "impartial" officers, as defined in Section 1415(b)(2), and the rights of parties to the hearing are set out in Section 1415(d). The time limits for the administrative stages are stated in 34 C.F.R. § 300.512 (1981). The standard of proof, special procedures, and relief available in the court action are specified in Section 1415(e)(2). Finally, Section 1415(e)(3) provides for the educational placement of the handicapped child during the pendency of the hearings and civil action.

In contrast, the implied action under Section 504 of the Rehabilitation Act is, of course, strictly judicial and, if available to a parent of a handicapped child for grievances cognizable under Section 1415(b)(1)(E) of EAHCA, would permit the parent to sue directly and thus bypass the prerequisite administrative hearings and other procedural limitations provided by Congress in Section 1415 of EAHCA. Moreover, the implied remedy under Section 504 is, by the reasoning in *Brown*, a "more general remed[y]" that is subject to preemption insofar as complaints cognizable under Section 1415(b)(1)(E) of EAHCA are concerned.

On its face, Section 504 applies to *all* programs receiving federal financial assistance, not just educational agencies, and to *all* handicapped persons, not just handicapped children. The nine regulations issued under Section 504 relating to education programs that receive federal aid, 34 C.F.R. §§ 104.31-.39

(1981), take up only 3½ pages in the *Code of Federal Regulations* and merely provide an outline of the nearly two hundred regulations issued under EAHCA, which consume almost 100 pages in the *Code*. See 34 C.F.R. pt. 300 (1981). Moreover, several of the regulations under Section 504 provide that compliance with the corresponding section of EAHCA is one means, though not the only means, of satisfying the requirements of the regulations, and are therefore broader than the requirements of EAHCA. *See* 34 C.F.R. § 104.33(b)(2) (1981); *id.* § 104.35(d); *id.* § 104.36. In short, because of the "balance, completeness, and structural integrity" of the "precisely drawn, detailed" express remedy in Section 1415 of EAHCA and because of the more general nature of the implied remedy under Section 504, the reasoning of *Brown* compels the conclusion that the implied remedy under Section 504 was preempted as to the types of complaints specified in Section 1415(b)(1)(E) of EAHCA.

The *Brown* Court's reasoning was reaffirmed in *Great American Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979), in which the plaintiff attempted to bring an action under 42 U.S.C. § 1985(3) for conspiratorial deprivation of his rights under Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1976). The Court reasoned that Congress had created in Title VII a "detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversarial resolution of claims," 442 U.S. at 372-73, and

> [i]f a violation of Title VII could be asserted through [§1985(3)], a complainant could avoid most if not all of these detailed and specific provisions of the law.

Id. at 375-76. Accordingly, the Court held that "deprivation of a right created by Title VII cannot be the basis for a cause of action under [§1985(3)]." *Id.* at 378. The *Novotny* holding, like that in *Brown*, requires the dismissal in this case of Plaintiff's claims against Petitioners under Section 504 and 42 U.S.C. § 1983.

In summary, the relevant decisions of this Court required the Eighth Circuit to affirm on two grounds the dismissal of Plaintiff's damages claims against Petitioners: (1) Plaintiff cannot recover damages in an implied action when the remedy available for the same claim in an action expressly created by Congress does not include monetary relief; and (2) the remedy expressly provided by Congress for complaints relating to the education of handicapped children preempted all more general remedies, including the implied action under Section 504 of the Rehabilitation Act and 42 U.S.C. § 1983, and does not allow the recovery of damages. Because the Eighth Circuit's holdings were contrary to these two propositions, this Court should grant certiorari to review the judgment.

II. The Court Of Appeals Incorrectly Applied This Court's Decisions In *Edelman* v. *Jordan* And *Mt. Healthy City School District* v. *Doyle* In Holding That A Special Public School District Which Receives Federal Funds Under The Education For All Handicapped Children Act And Whose Sole Functions Are The Education Of Handicapped Children And The Providing Of Vocational Education Does Not Share The State's Eleventh Amendment Immunity From Suit For Damages Regarding The District's Provision Of Education To The Handicapped.

The Court of Appeals relied entirely on *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274 (1977), in holding that "[t]he eleventh amendment . . . does not preclude the award of damages against the Special School District" Defendants. 673 F.2d at 980. Petitioners contend that this reliance was misplaced and that the rule applicable to the facts of the present case was stated in a section of *Edelman* v. *Jordan* on which the Eighth Circuit did not rely.

The Court in *Mt. Healthy* was faced with the issue whether the board of education of a local school district "is to be treated

as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." 429 U.S. at 280. Examining "the nature of the entity created by state law," the Court found that local school districts in Ohio receive some guidance and substantial financial assistance from the State, but have the power to issue bonds and to levy taxes. The Court concluded that a local school board "is more like a county or city than it is like an arm of the State" and therefore is not shielded by the Eleventh Amendment from suit in federal court. *Id.* at 280-81.

The Court in *Mt. Healthy* found it unnecessary to discuss general rules determining when the Eleventh Amendment applies. In *Edelman* v. *Jordan,* however, the principle which should govern the present case was clearly set out. After quoting a passage from *Ford Motor Co.* v. *Department of Treasury,* 323 U.S. 459, 464 (1945), the Court stated as follows:

> Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.

415 U.S. at 663 (citing *Great Northern Life Ins. Co.* v. *Read,* 332 U.S. 47 (1944), and *Kennecott Copper Corp.* v. *State Tax Comm'r,* 327 U.S. 573 (1946)). Reconciling the *Mt. Healthy* decision with this general rule is a relatively simple matter, for it is difficult to conceive how a damages award against an ordinary local school district could be paid out of the State treasury. There is simply no mechanism by which the liability of the local district would be transferred to the State.

The situation of the Special School District, however, differs radically, both factually and legally, from that of the local school district in *Mt. Healthy.* In the first place, the Special District does not offer a program consisting of regular-curriculum courses; all its students are either handicapped

children in need of special educational services or nonhandicapped high school juniors or seniors who choose to enroll in a vocational education program. During the 1980-81 school year, the number of handicapped students exceeded the number taking vocational courses by a ratio of almost 7 to 1. The total number of handicapped students was large: 14,522. If the Eighth Circuit's holding in this case, which would allow a handicapped child or his parent to sue for damages in regard to one of the matters listed in Section 1415(b)(1)(E) of EAHCA, is not reversed, the potential liability of Petitioners would be staggering, both in absolute terms and compared to the potential liability of typical local school districts.

In addition to factual differences between the Special District and the local school board in *Mt. Healthy*, the legal relations between the Special District and the State of Missouri under both EAHCA and the Missouri statutes governing the provision of special educational services to handicapped children, Mo. Rev. Stat. §§ 162.670-.995 (1978 & Supp. 1981), make the *Mt. Healthy* holding inapplicable in the present case and compel the conclusion that Petitioners are entitled to the protection of the Eleventh Amendment. As one of many preconditions to the receipt of federal funds under EAHCA, a State must demonstrate to the Secretary of Education that the "State educational agency" will bear the ultimate responsibility for carrying out EAHCA's requirements and for supervising all educational programs for handicapped children within the State to ensure they meet educational standards established by the State agency. 20 U.S.C. §§ 1412(6), 3441(a)(1) (1976 & Supp. IV 1980); *see* 34 C.F.R. § 300.600(a) (1981). Other preconditions are that the State have in effect a policy that guarantees a "free appropriate public education," as defined in 20 U.S.C. § 1401(18) (1976), to each handicapped child in the State, *id.* § 1412(1), and that the State have developed a plan describing the steps taken by the State to assure, *inter alia*, the location and evaluation of all handicapped children in the State, regardless of the severity of their handicap, and the provision of a free ap-

propriate public education to all these children by dates specified in the Federal Act, *id.* § 1412(2)(B), (C).

In order to receive EAHCA funds, a local educational agency such as the Special District must submit to the State agency an application assuring that EAHCA payments would be spent for programs to locate and evaluate all handicapped children within its jurisdiction, to establish a goal of providing such children a free appropriate public education, and to set up a detailed timetable for accomplishing this goal. *Id.* § 1414(a)(1)(A), (C)(ii), (D). The application must also provide assurances that the local agency will prepare and revise an IEP for each handicapped child at least once a year. *Id.* § 1414(a)(5).

The provisions directly relevant to the question whether a damages award against Petitioners would be paid from the State treasury are contained in Section 1414(d), which provides in part:

> Whenever a State educational agency determines that a local educational agency—
>
> (1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section; [or]
>
> . . . .
>
> (3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;
>
> the State education agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner,

> and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

As mentioned above, the Special School District provided special educational services to more than 14,500 handicapped children during the 1980-81 school year. If only a handful of these students were to win damage awards against the District in any given year,[3] Petitioners' liability could be enormous and would, in any event, seriously deplete the resources available for special education. The shortage of funds could, for example, result in the inability to perform annual revisions of 15,000 IEP's or to provide for the needs of the most severely handicapped. In whatever form the deficit is manifested, Section 1414(d) places upon the State educational agency responsibility for making up the shortfall.

One of the regulations implementing EAHCA indicates that the State agency's responsibility under Section 1414(d) may be met in several ways:

> In meeting the requirements of [Section 1414(d)], the State educational agency may provide special education and related services directly, by contract, or through other arrangements.

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[3] Petitioners note that if they are exposed to suits for damages, the certainty that damages will be awarded in some cases implies no dereliction of their duty to educate handicapped children. As the Seventh Circuit observed in *Anderson* v. *Thompson*:

> [I]n as new and undeveloped a field as special education, there is a need for flexibility and experimentation in programming for handicapped children. We take judicial notice of the fact that at the present time, problems of classification and treatment abound. Disagreements will arise and errors will be made.

658 F.2d at 1213.

34 C.F.R. § 300.360(b) (1981). Although the Missouri statutes governing the education of the handicapped do not expressly address the situation where a special school district lacks the funds to provide an appropriate education for all its students, a general analysis of the statutes indicates that the State would become responsible for the Special District's "severely handicapped" students. Section 162.675 of the Missouri Revised Statutes defines "handicapped children" as follows:

> As used in sections 162.670 to 162.995, unless the context clearly indicates otherwise, the following terms mean:
>
> . . . .
>
> (2) "Handicapped children", children under the age of twenty-one years who have not completed an approved high school program and who, because of mental, physical, emotional or learning problems, require special educational services in order to develop to their maximum capacity . . . .

Mo. Rev. Stat. § 162.675(2) (1978). "Severely handicapped children" are then defined as a subclass of "handicapped children," who, "because of the extent of the handicapping condition..., are unable to benefit from or meaningfully participate in programs in the public schools for handicapped children." *Id.* § 162.675(3).

In general, Section 162.700(1) requires each local school district in the State to provide "special educational services," as defined in Section 162.675(4), to each handicapped child residing in the district. If the local district is unable to provide its "severely handicapped" children with programs that meet standards set by the State board of education, then Section 162.725(1) requires the State board to educate those children, either in "state schools for severely handicapped children" established pursuant to Section 162.730, or by contract with another public or private agency, as authorized in Section

162.735. In such a case, the local district becomes obligated to "pay toward the cost of the education of the child an amount equal to the average sum produced per child by the local tax effort of the district." Mo. Rev. Stat. § 162.740 (Supp. 1981). Where a special school district has been formed, however, the allocation of responsibility changes. The special district must provide special educational services to all handicapped and severely handicapped children residing in the local districts that make up the special district, *id.* §§ 162.700(1), (3), .725(3), and the State and local districts are relieved of any responsibility within the area served by the special district. *See id.* § 162.890.

Since there is no express provision applicable in the event of a determination against a special district under Section 1414(d) of EAHCA, it is most likely that the relevant Missouri statutes would be held to apportion the costs and responsibilities of educating the children whom the special district could no longer serve as if the special district had ceased to exist. The local districts of residence would become responsible for the "overflow" children. In St. Louis County, however, because the local districts have generally relied on the Special District for the education of handicapped and, in particular, severely handicapped children, and do not have adequate programs of their own, the responsibility for the severely handicapped would almost certainly be passed on to the State under Section 162.725(1). Furthermore, since the cost of providing special educational services to a severely handicapped child is several times greater than the cost for a less handicapped child,[4] and since the special district would almost certainly wish to continue providing appropriate educations for as many handicapped

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[4] *See* p. 25 & note 6 *infra.*

children as possible,[5] the effect of a special district's shortage of funds occasioned by the payments of damages awards would be borne almost exclusively by the severely handicapped, for whom the State would become responsible.

In a case where the State educational agency is required by Section 1414(d) to assume responsibility for the provision of special education and related services, the Section provides that the State agency shall use the EAHCA funds that the local district otherwise would have received for that purpose. This amount, however, is negligible. During the 1980-81 school year, the Special School District received $205.00 in EAHCA funds for each handicapped child. In contrast, the Special District's average cost of providing special educational services for the year to a severely handicapped child, as defined in Mo. Rev. Stat. § 162.675(3) (1978), was $6,782.49.[6] The State agency would also be entitled to a contribution from the local district under Section 162.740. This sum will vary between districts, but in 1980-81, the average tax effort per pupil in the local districts of St. Louis County was $1,696.37. Assuming that the State would incur the same annual cost as the Special District for providing special education to a severely handicapped child, the State would have to pay an average net sum of $4,881.12 for each severely handicapped child to whom the Special District could no longer provide special educational services.

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[5] It seems that this preference would be mandated by 20 U.S.C. § 1414(a)(1)(C)(ii) (1976), which requires that a local educational agency's priorities in providing a free appropriate public education be

> first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education . . . .

[6] In contrast, the District's average annual cost for a handicapped child who was not "severely handicapped" was $1,858.83.

In conclusion, if Petitioners are sued for damages for matters related to the provision of education to handicapped children, then the lion's share of such judgments as are returned would be passed on to the State via Section 1414(d) of EAHCA and the relevant Missouri statutes. This fact distinguishes the present case from *Mt. Healthy City School District* v. *Doyle* and makes the holding of that case inapplicable here. The rule stated in *Edelman* v. *Jordan* requires that Petitioners be held to have Eleventh Amendment immunity from suit for damages relating to their provision of special education to handicapped children. The judgment of the Eighth Circuit to the contrary should be reversed.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-1971

Terri Ann Miener, by and through her next friend and parent, Clyde J. Miener,

Appellant,

v.

State of Missouri, and Joseph P. Teasdale, Governor; Department of Elementary and Secondary Education of the State of Missouri, Arthur L. Mallory, Commissioner of Education of the Department of Elementary and Secondary Education of the State of Missouri; Dr. Leonard Hall, Assistant Commissioner of Education, The Division of Special Education of the Department of Elementary and Secondary Education of the State of Missouri, The Special School District of St. Louis County, Missouri; The Board of Education of the Special School District of St. Louis County, Missouri; Allan G. Barclay, Gerald K. Braznell, and Gerald B. Hansen, Directors of the Special School District of St. Louis County, Missouri; Mr. Thomas E. Smith, Superintendent of Schools of the Special School District of St. Louis County, Missouri; Department of Mental Health of the State of Missouri, Joe L. Winter, Commissioner of the Department of Mental Health of the State of Missouri; Paul R. Ahr, Acting Director of the Department of Mental Health of the State of Missouri; Mr. John Twiehaus, individually and in his official capacity as the Acting Superintendent of the St. Louis State Hospital; Dr. Milton Fujita, individually and in his former official capacity as Medical Director of the Youth Center of the St. Louis State Hospital, Missouri State Board of Education,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: April 15, 1981

Filed: February 4, 1982

Before BRIGHT, HENLEY and ARNOLD, Circuit Judges.

HENLEY, Circuit Judge.

Appellant Terri Ann Miener, by and through her guardian and next friend Clyde J. Miener, brought this action against several state and local governmental entities to secure rights allegedly due to her as a handicapped person. She sought declaratory, injunctive and monetary relief pursuant to 42 U.S.C. § 1983; the Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (1973), 29 U.S.C. §§ 701 *et seq.* (the Rehabilitation Act); the Education for All Handicapped Children Act of 1975, Pub. L. 94-142, 89 Stat. 773 (1975), 20 U.S.C. §§ 1401 *et seq.* (EAHCA or the Education Act); and the equal protection clause of the fifth and fourteenth amendments.[1] Appellant appeals several orders[2] of the district court which, taken together, serve to dismiss her claims to damage relief on the merits prior to hearing.

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[1] Appellant also asserted a pendent state tort claim which is not here at issue.

[2] Most of the issues on appeal arise from an order and memorandum opinion dated January 25, 1980, published at 498 F. Supp. 944 (E.D. Mo. 1980). The remaining issues involve an order and memorandum opinion dated September 19, 1980, published at 494 F. Supp. 949 (E.D. Mo. 1980).

We assume jurisdiction pursuant to 28 U.S.C. § 1291. We reverse in part and affirm in part the district court's dismissal, and remand the case for further proceedings consistent with this opinion.

Appellant has a history of serious medical problems highlighted by the occurrence and reoccurrence of a brain tumor, initially at age two, and later at age fourteen. As a result of this condition and attendant surgery, she suffers serious learning disabilities and behavioral disorders.

Appellant alleged[1] that she was a voluntary resident at facilities of the Missouri Department of Mental Health beginning in June, 1977. From this time until April, 1980 when she was removed to a private facility, appellant claimed that she was deprived of an appropriate free education in violation of the Education for All Handicapped Children Act, 20 U.S.C. § 1411. She also alleged that defendants denied her equal access to educational facilities, in violation of the antidiscrimination provisions contained in Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and in violation of 42 U.S.C. § 1983.

Numerous individuals and political bodies and agencies were named as defendants, including the State of Missouri and its Chief Executive Officer, Governor Joseph P. Teasdale; the Missouri Department of Elementary and Secondary Education, and its Commissioner, Arthur Mallory, and Assistant Commissioner, Dr. Leonard Hall; the Missouri Department of Mental Health, its acting Director, Dr. Beverly Wilson, and the Commissioner of Mental Health for the State of Missouri, Norman

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[1] In reviewing the granting of defendants' motion to dismiss, we view the complaint in the light most favorable to the plaintiff, *Jackson Sawmill Co.* v. *United States*, 580 F.2d 302, 306 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979), and take its allegations as true. *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972).

Tice; the acting Superintendent of the St. Louis State Hospital, John Twiehaus, and the former Medical Director of the Youth Center at that Hospital, Dr. Milton Fujita; the Special School District of St. Louis County, Missouri, its Board of Education, its Directors, Allan Barclay, Gerald Braznell, and Gerald Hansen, and its Superintendent of Schools, Thomas Smith.

Appellant prayed for injunctive relief in the form of equal access to all programs and facilities of the St. Louis State Hospital and participation in the special education programs of the St. Louis County Special School District. She asserted a right to damages in the amount of $50,000.00 for deprivation of her constitutional right of equal protection and statutory rights, and $474,358.00 for violation of her statutory right to a full and adequate education. She sought prospective relief in the form of compensatory educational services to overcome the effects of any past denial of special educational services.

The district court initially ordered appellant to pursue administrative remedies under the EAHCA and Missouri statutes. On January 25, 1980 the court dismissed appellant's claims for damages under the Rehabilitation and Education Acts on the ground that no private cause of action for damages exists pursuant to these statutes. The court also dismissed all claims pursuant to 42 U.S.C. § 1983, while refusing to dismiss the enforcement claims asserted under the Education Act and § 504 of the Rehabilitation Act. The pendent tort claim and the claim for compensatory education also remained.

In the course of pursuing administrative remedies, the parties eventually settled the enforcement claims. A settlement agreement, approved by the district court on April 23, 1980, provided for appellant's placement, education and psychiatric treatment in the Crittenton Center and Hickman-Mills School District in Kansas City, Missouri.

The state defendants thereafter, on July 8, 1980, filed a motion to dismiss the claim for compensatory education on the ground that this was a claim for damages which must fall in accordance with the district court's dismissal of damage claims in its January 25, 1980 order. On September 19, 1980 the district court agreed, dismissing the claim for compensatory education as a request for damages barred by the eleventh amendment. The state tort claim was dismissed without prejudice. The motion of the St. Louis County Special School District for summary judgment was dismissed as moot.

Appellant's primary allegations on appeal are that the district court erred in (1) ruling that a private right of action for damages is not available under Section 504 of the Rehabilitation Act; (2) ruling that a private right of action for damages cannot be implied under the Education Act; (3) dismissing her claim under 42 U.S.C. § 1983 for failure to state a claim; (4) dismissing her claim for compensatory education as an action for damages barred by the eleventh amendment. Because we reverse in part the district court's dismissal, we are obliged also to reach the allegation that the district court abused its discretion in denying appellant leave to amend her complaint.

The crux of this appeal is whether a cause of action for damages can be entertained under any of the statutes relied on by appellant. This inquiry necessarily involves a two-step analysis. We ask first whether a private cause of action may be asserted pursuant to the statutes named in her complaint. As a separate question, we examine the propriety of damage relief. *Davis* v. *Passman*, 442 U.S. 228, 244 (1978) (implication of a right of action is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive).

I. PRIVATE CAUSE OF ACTION.

(A) Section 504 of the Rehabilitation Act

The district court held, correctly we believe, that under the test of *Cort* v. *Ash*, 422 U.S. 66 (1975), and the authority of *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), individual plaintiffs have a private cause of action under Section 504 of the Rehabilitation Act. The weight of authority in this and other circuits supports the implication of a cause of action. *See Pushkin* v. *Regents of the University of Colorado*, No. 81-1224 (10th Cir. Sept. 4, 1981); *Simon* v. *St. Louis County*, 656 F.2d 316 (8th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3404 (U. S. Nov. 17, 1981) (No. 81-850); *Kling* v. *County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980); *Carmi* v. *Metropolitan St. Louis Sewer District*, 620 F.2d 675 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980); *Camenisch* v. *University of Texas*, 616 F.2d 127, 131 (5th Cir. 1980), *vacated on other grounds*, 101 S. Ct. 1830 (1981); *NAACP* v. *Medical Center, Inc.*, 599 F.2d 1247, 1258-59 (3d Cir. 1979); *Davis* v. *Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *Leary* v. *Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Kampmeier* v. *Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277, 1284-87 (7th Cir. 1977) (but expressly leaving open the question whether enforcement regulations yet to be issued might limit judicial remedies, at n.29).

We find no reason to reiterate the thorough review of legislative history contained in the above-cited authorities. We expressly note, however, that we have reexamined these cases in light of recent Supreme Court decisions which could be perceived to offer an opportunity for a different result. For reasons more fully

indicated in the footnote,[4] we are persuaded that recent Supreme Court rulings should not change our finding of a private cause of action under § 504.

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[4] The Supreme Court has expressly declined to decide whether private action can be implied under Section 504. *Southeastern Community College* v. *Davis,* 442 U.S. 397, 404-05 n.5 (1979). *But see Campbell* v. *Kruse,* 434 U.S. 808 (1977), in which the Court vacated and remanded a district court decision that partial tuition grants to handicapped children denied equal protection. The Court directed the district court to decide the case based on Section 504, thus suggesting that a private right of action exists under the statute.

The Court has also refined the threshold question of the *Cort* test, which asks whether the statute was enacted for the benefit of a special class of which the plaintiff is a member. *Cort* v. *Ash,* 422 U.S. 66, 78 (1975). Under this test, a private cause of action will be readily found "where the language of the statute explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff." *Universities Research Ass'n* v. *Coutu,* 101 S. Ct. 1451, 1462 (1981), *quoting Cannon* v. *University of Chicago,* 441 U.S. 677, 690 n.13 (1979). There is less reason to infer a private remedy if Congress has framed the statute as "a general prohibition or a command to a federal agency." *Id.*

Section 504 of the Rehabilitation Act is drafted with an unmistakable focus on the benefited class of handicapped persons, providing:

> No otherwise qualified handicapped individual in the United States, as defined in section 706 (7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service.

29 U.S.C. § 794. We conclude that the implicaton of a cause of action under § 504 is, if anything, bolstered by the Supreme Court's refinement of the *Cort* test.

Finally, we are not persuaded to reach a different conclusion by the case of *Pennhurst State School & Hospital* v. *Halderman,* 101 S. Ct. 1531 (1981), in which the Supreme Court held that a statute enacted pursuant to the Spending Power alone did not create substantive rights for disabled persons because new legal duties were not declared

The barrier to appellant's Section 504 cause of action, if any, lies in an aspect of standing which we raise *sua sponte* as a jurisdictional matter. This barrier involves the incorporation of Title VI remedies into the Rehabilitation Act. Section 504 of the Rehabilitation Act provides by its terms that no otherwise qualified individual shall be discriminated against under any program or activity receiving federal financial assistance. 29 U.S.C. § 794. Section 505 breathes remedial life into this provision by making available to the aggrieved plaintiff the procedures and remedies of Title VI of the Civil Rights Act of 1964.[5] The incorporation of Title VI remedies, however, has proved to be a double-edged sword. Section 604 of Title VI, 42 U.S.C. § 2000d-3, states:

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through clearly imposed conditions rather than mere precatory language. *Id.* at 1540, 1543-45. At least one court has thought the *Pennhurst* analysis should apply to determine whether § 504 imposes an obligation on a state such as can be enforced through a private cause of action. *Tatro* v. *Texas,* 516 F. Supp. 968, 984 (N.D. Tex. 1981). We conclude to the contrary that *Pennhurst* is inapplicable. *Accord, Pushkin* v. *Regents of the University of Colorado,* No. 81-1224, slip op. at 11-12 (10th Cir. Sept. 4, 1981). We note without deciding that § 504 at least arguably rests not on Congress's Spending Power but on Congress's power to secure the guarantees of the fourteenth amendment. *See* Comment, "Employment Discrimination Against the Handicapped: Can *Trageser* Repeal the Private Right of Action?" 54 N.Y.U.L. Rev. 1173, 1174 & nn.5-8 (1979) (and citations therein). Moreover, nondiscrimination against handicapped persons is an undisputed condition for the receipt of federal funding. In sum, the analysis in *Pennhurst* is simply irrelevant to determining a § 504 cause of action. *Cf. Lieberman* v. *Univ. of Chicago,* No. 80-2549, slip op. at 8-10 (7th Cir. Sept. 23, 1981) (Swygert, Sr.J., dissenting) (reaching same conclusion as to Title IX).

[5] The incorporation of Title VI remedies occurred by amendment of the Rehabilitation Act in 1978. A new § 505 was added to provide in part:

> *Nothing* contained in this subchapter *shall be construed to authorize action* under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization *except where a primary objective of the Federal financial assistance is to provide employment.*

(emphasis added). This express limitation on standing under Title VI gives rise to the question whether Congress intended the limitations in Title VI to apply in an action under § 504.

Judicial thought on this question is divided. *Compare* cases regarding Section 604 of Title VI as a limitation on standing under Section 504, *Simon* v. *St. Louis County, supra,* 656 F.2d at 319 n.6; *Simpson* v. *Reynolds Metals Co.,* 629 F.2d 1226, 1234 and n.13 (7th Cir. 1980); *United States* v. *Cabrini Medical Center,* 639 F.2d 908, 910-11 (2d Cir. 1981); *Carmi* v. *Metropolitan St. Louis Sewer District, supra,* 620 F.2d at 674-75; *Trageser* v. *Libbie Rehabilitation Center, Inc.,* 590 F.2d 87, 88-89 (4th Cir. 1978), *cert. denied,* 442 U.S. 947 (1979); *with Carmi* v. *Metropolitan St. Louis Sewer District, supra,* 620 F.2d at 679 and n.11 (McMillian, J., dissenting); *North Haven Board of Education* v. *Hufstedler,* 629 F.2d 773, 786 (2d Cir. 1980) (closely analogous context of Title IX), *cert. granted,* 450 U.S. 909 (1981). Cases in this Circuit which have regarded Section 604 as a limitation on standing, however, have involved allega-

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> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 [29 U.S.C. § 794] of this Act.
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Pub. L. 95-602, 92 Stat. 2955, 2983 (1978), codified as 29 U.S.C. § 792a(a)(2).

tions of discrimination in employment. *Simon* v. *St. Louis County, supra; Carmi* v. *Metropolitan St. Louis Sewer District, supra.* Indeed, the language in Section 604 is facially directed to circumstances of alleged discrimination in employment.

Here, appellant is not trying to get a job. She alleges discrimination in the provision of educational services. In these circumstances, Section 604 does not apply and appellant's standing is unaffected by the Title VI requirement that an aim of the federal funding must be to provide employment.

(B) The Education Act

Appellees do not dispute that the Education Act for All Handicapped Children provides a private cause of action in federal court. *See* 20 U.S.C. § 1415(e)(2). The contested issue with respect to the Education Act is the availability of damages, hereinafter discussed.

(C) Section 1983

The availability of a remedy under § 1983 presents a more difficult question. The district court concluded that discrimination on the basis of handicaps is made illegal by Section 504, not by the Constitution. Accordingly, the court concluded that appellant failed to state a § 1983 claim for two reasons: a statutory violation was insufficient to support a claim under § 1983, and invidious discrimination in violation of the equal protection clause of the Constitution has not been alleged.

The opinion in *Maine* v. *Thiboutot,* 448 U.S. 1 (1980), not available when the district court made its determination, renders this analysis inadequate. In that case, the Supreme Court held that § 1983 encompassed a claim based purely on statutory violations of federal social security statutes. 448 U.S. at 4-6. The Court expressly stated that § 1983 is not limited to violations of civil rights or equal protection laws. *Id.* at 6-8. Under

the reasoning of *Thiboutot*, § 1983 arguably provides a remedy[4] for violations of the Rehabilitation Act or the Education for all Handicapped Children Act, or both.

The difficult question here is whether either of two exceptions to the *Thiboutot* doctrine apply. A § 1983 cause of action does not lie (1) where Congress has foreclosed a § 1983 remedy through sufficiently comprehensive remedial devices in the underlying act, and (2) where the statute at issue does not create "rights, privileges, or immunities" within the meaning of § 1983. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 101 S. Ct. 2615, 2626 (1981); *Pennhurst State School & Hospital* v. *Halderman*, 101 S. Ct. 1531, 1545-46 (1981).

The parties and the district court have been afforded no opportunity to address these complex and important exceptions. Case law is divided on the availability of § 1983 as a remedy for violations of the Education Act and Rehabilitation Act. *Anderson* v. *Thompson*, No. 80-2364, slip op. at 18-22 (7th Cir. Sept. 8, 1981) (§ 1983 does not provide remedy for claims under EAHCA); *Pushkin* v. *Regents of the University of Colorado*,

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[4] Section 1983 is remedial in nature, and does not in itself provide for any rights, substantive or otherwise. *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600 (1979). Section 1983 merely "ensure[s] that an individual ha[s] a cause of action for violations of the Constitution," *id.* at 617, and "authorizes a cause of action based on the deprivation of civil rights guaranteed by other acts of Congress." *Id.* at 618. While *Thiboutot* makes explicit that a § 1983 cause of action extends to cover statutory violations, this ruling does not change the fact that § 1983 itself creates no substantive rights. A § 1983 claim presumably must fail if the underlying statute does not create substantive rights. *See Pennhurst State School & Hospital* v. *Halderman, supra*, 101 S. Ct. 1531 (Developmentally Disabled Assistance and Bill of Rights Act did not in § 111 create substantive rights).

supra, No. 81-1224, slip op. at 17 (10th Cir. Sept. 4, 1981) (§ 1983 provides remedy for violation of § 504 without exhaustion of administrative remedies); *Tatro* v. *Texas*, 516 F. Supp. 968, 984 (N.D. Tex. 1981) (§ 1983 provides remedy under EAHCA provided administrative remedies are exhausted); *McGowan* v. *Hahn*, No. 78-C-4233 (N.D. Ill. July 27, 1981) (§ 1983 provides remedy for violation of § 504); *Medley* v. *Ginsberg*, 492 F. Supp. 1294, 1305 (S.D. W.Va. 1980) (plaintiffs may state § 1983 claim based on the Rehabilitation Act or Education Act); *Boxall* v. *Sequoia Union High School District*, 464 F. Supp. 1104, 1113 (N.D. Cal. 1979) (damages under § 1983 are available to enforce federal statutory rights guaranteed by the EAHCA); *cf. Romeo* v. *Youngberg*, 644 F.2d 147, 170 (3d Cir. 1980) (en banc) (§ 1983 may provide a remedy for statutory claims grounded in the Developmentally Disabled Assistance and Bill of Rights Act), *cert. granted*, 101 S. Ct. 2313 (1981). The authority of these cases is also subject to the limitation that several were decided after *Thiboutot*, but prior to *Pennhurst* and *Middlesex*, *supra*, in which the Supreme Court recognized limitations on the *Thiboutot* doctrine.

Remand is also indicated because appellant's complaint is unclear in two respects. The complaint does not unequivocally disclose whether damages are sought pursuant to § 1983. Counts II and III, which were interpreted by the district court as asserting claims under § 1983, contain prayers for injunctive relief. One conclusion which could be drawn is that appellant relies upon § 1983 only for injunctive relief, which is now a moot issue.

More important, appellant's prayer for relief includes a request for $50,000.00 for "depriv[ation] . . . of the equal protection of the laws and . . . of . . . civil . . . and constitutional rights; $474,358.00 for "violation of . . . statutory and civil rights in denying plaintiff her rights to a full and adequate education"; $15,000.00 "for . . . personal injuries"; and com-

pensatory relief in the form of additional education. This pleading does not make clear whether the damages requested for alleged statutory violations are coextensive with the damages sought pursuant to § 1983. If appellant intends to utilize § 1983 to recover damages not obtainable pursuant to the underlying statutes, our analysis would be affected by the apparent inconsistency of § 1983 and statutory remedies.

In sum, we remand for the district court's consideration of (1) the question whether appellant seeks damages, as opposed to injunctive relief, pursuant to § 1983; (2) the question whether, if appellant seeks monetary damages pursuant to § 1983, such damages are coextensive with those sought pursuant to the underlying statutes; (3) the question whether the exclusivity exception to the *Thiboutot* doctrine applies;[7] (4) the question whether the rights guaranteed by the underlying statutes are "rights secured by the laws of the United States" within the meaning of § 1983. On remand appellant may also wish to consider the extent to which her case is advanced by claim of a § 1983 cause of action, given our rulings as to availability of damages.

II. DAMAGES

Having concluded that a cause of action exists under both the Education Act and the Rehabilitation Act, we are faced with the issue of available relief. Despite the existence of a cause of action, appellant's complaint is subject to dismissal under Fed. R. Civ. P. 12 unless it can be determined that the damage relief she seeks is appropriate. *Davis* v. *Passman, supra,* 442 U.S. at 244.

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[7] One aspect of this inquiry is whether exhaustion of administrative remedies can save appellant from a ruling that the statutory remedies are exclusive. *See Tatro* v. *Texas, supra,* 516 F. Supp. at 968 (holding that the Education Act does not foreclose a § 1983 suit provided administrative remedies are exhausted).

(A) Section 504

Appellant's right to damage relief under § 504 is an open question in this and other circuits. *Pushkin* v. *Regents of the University of Colorado, supra,* No. 81-1224, slip op. at 2 & n.2 (10th Cir. Sept. 4, 1981); *Camenisch* v. *University of Texas, supra,* 616 F.2d at 132 n.10.

The starting point for our analysis is the principle enunciated by the Supreme Court in *Bell* v. *Hood,* 327 U.S. 678, 684 (1946), that where legal rights are invaded and a federal statute provides a right to sue for such invasion, federal courts may use any available remedy to make good the wrong. The existence of a statutory right implies the existence of all necessary and appropriate remedies. *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229, 239 (1969). Moreover, the right to seek money damages for civil rights violations is an accepted feature of the American judicial system. *Patton* v. *Dumpson,* 498 F.Supp. 933, 937 (S.D.N.Y. 1980) (holding damages are available under § 504).

Without reference to these general principles, however, at least one court has held that the existence of an elaborate administrative structure for *governmental* enforcement of § 504 precludes a finding that Congress intended to provide a "whole panoply of new rights and remedies" for individuals. *Boxall* v. *Sequoia Union High School District, supra,* 464 F. Supp. at 1112. This argument must be accorded some weight in light of Supreme Court cases stating that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 19 (1979) (and citations therein).

The facts in *Transamerica,* however, serve by contrast to highlight here the lack of statutory remedies such as can make the individual plaintiff whole. In *Transamerica,* a rescission remedy was expressly provided by statute, and federal courts

had implied a cause of action for restitution and injunctive relief under the Investment Advisors Act of 1940. *Id.* Criminal penalties and administrative sanctions were also expressly authorized. *Id.* at 20. In those circumstances, the Court found that Congress harbored no intention of providing an additional damage remedy. *Id.* at 21.

However, the administrative enforcement remedies provided under the Rehabilitation Act are of little comfort to the individual plaintiff. The regulations adopted by the Department of Health and Human Services (HHS), incorporating procedures applicable to Title VI of the 1964 Civil Rights Act, 45 C.F.R. § 84.61; 45 C.F.R. § 80.6-81.10 (1981), provide administrative sanctions such as the termination of funds for acts of discrimination. 45 C.F.R. § 80.8. No provision is made for the complainant to furnish evidence or otherwise participate in the agency investigation. 45 C.F.R. § 80.7(c). The complainant has no right to object to, or seek administrative review of, HHS's findings. 45 C.F.R. § 80.7(d)(2). There is no provision for HHS to issue a binding order that damages be paid to an individual who has been injured by reason of a violation of § 504.

It is obvious that administrative remedies are inadequate to vindicate individual rights and that Congress could not have expected the individual plaintiff to be made whole through administrative procedures. Indeed, there is support for a damage remedy to be found in the legislative history of 1978 amendments to the Rehabilitation Act. The House-Senate Conference Committee eliminated a prohibition against money damages which had been proposed regarding vocational rehabilitation programs under the Act. H.R. Rep. 95-1780, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code, Cong. & Ad. News 7375, 7379.

We indulge the presumption of *Bell* v. *Hood, supra,* that a wrong must find a remedy, and in light of the inadequacy of administrative remedies, conclude that damages are awardable

under § 504.[8] *Campbell* v. *Talladega County Board of Education*, 518 F. Supp. 47, 56-7 & n.13 (N.D. Ala. 1981) (damages awardable but barred by impossibility of measurement and by eleventh amendment); *Patton* v. *Dumpson, supra*, 498 F. Supp. at 937-39; *Poole* v. *South Plainfield Board of Education*, 490 F. Supp. 948, 949 (D. N.J. 1980); *but see Boxall* v. *Sequoia Union High School District, supra*, 464 F. Supp. at 1111-12 (relying on analogy to Title VI of the Civil Rights Act of 1964).[9]

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[8] We assume *arguendo*, without deciding, that *Transamerica* may shift to the party proposing the remedy the burden of proving that Congress intended the requested relief in addition to the express provision of other statutory remedies. *See also Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419 (1975), *citing Nat'l Railroad Passenger Corp.* v. *Nat'l Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *Lieberman* v. *Univ. of Chicago, supra*, No. 80-2549, slip op. at 3 n.4, 16 (7th Cir. Sept. 23, 1981) (noting some inconsistency of *Bell* v. *Hood* and *Transamerica*). Here, we find that appellant can discharge that burden.

[9] In reaching this conclusion, we have examined the issue of damages in the closely analogous contexts of Title VI and Title IX. HHS's final regulations implementing § 504, *see* 45 C.F.R. § 84.61 (1981), adopt the same procedures as are used to enforce Title VI and 20 U.S.C. § 1681 as part of Title IX. *See* 45 C.F.R. § 36.71 (1979).

The analogy to these statutes is of little help because judicial thought as to damages under Title IX and Title VI is divided. *E.g.*, *Lieberman* v. *University of Chicago, supra*, No. 80-2459 (7th Cir. Sept. 23, 1981) (Title IX); *Guardians Ass'n of New York City* v. *Civil Serv. Comm'n*, 633 F.2d 232 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 3083 (1981) (Title VI). The diversity of views expressed in these cases convinces us that we cannot resolve the damage issue by analogy to sister statutes. *Cf. Valentine* v. *Smith*, 654 F.2d 503, 512 (8th Cir. 1981); *Chambers* v. *Omaha Public School Dist.*, 536 F.2d 222, 225 n.2 (8th Cir. 1976) (issue of damages under Title VI is not resolved in this circuit).

Since administrative remedies are of little avail to the individual plaintiff, we also conclude that § 504 suits appropriately may be maintained in advance of the exhaustion of administrative remedies.[18]

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[18] Case law is divided on the issue of exhaustion as a prerequisite to a § 504 suit.

Must exhaust: *Groshong* v. *Independent School Dist.*, Civ. No. 3-77-376 (D. Minn. Nov. 13, 1980); *Stubbs* v. *Kline*, 463 F. Supp. 110, 117 (W. D. Pa. 1978); *Doe* v. *New York Univ.*, 442 F. Supp. 522 (S.D. N.Y. 1978); *Crawford* v. *Univ. of North Carolina*, 440 F. Supp. 1047, 1058 (M.D. N.C. 1977); *NAACP* v. *Wilmington Medical Center*, 426 F. Supp. 919 (D. Del. 1977).

Exhaustion rejected: *Pushkin* v. *Regents of the Univ. of Colorado, supra*, No. 81-1224, slip op. at 16 (10th Cir. Sept. 4, 1981); *Kling* v. *County of Los Angeles*, 633 F.2d 876, 879 (9th Cir. 1980); *Camenisch* v. *Univ. of Texas*, 616 F.2d 127, 133-36 (5th Cir. 1980);, *vacated on other grounds*, 101 S. Ct. 1830 (1981); *Riley* v. *Ambach*, 508 F. Supp. 1222, 1234-35 (E.D. N.Y. 1980); *Lestrange* v. *Consolidated Rail Corp.*, 501 F. Supp. 964, 969 (M.D. Pa. 1980); *Patton* v. *Dumpson*, 498 F. Supp. 933, 939-41 (S.D. N.Y. 1980); *Medley* v. *Ginsberg*, 492 F. Supp. 1294, 1305-07 (S.D. W.Va. 1980); *Whitaker* v. *Bd. of High Educ.*, 461 F. Supp. 99, 106-09 (E.D. N.Y. 1978); *Michigan Paralyzed Veterans* v. *Coleman*, 451 F. Supp. 7 (E.D. Mich. 1977).

See also Cannon v. *Univ. of Chicago, supra*, 441 U. S. at 706 n.41 (individual suits are appropriate in advance of exhaustion in the analogous context of Title IX); *Rosado* v. *Wyman*, 397 U. S. 397, 406 (1970) (principle of exhaustion of administrative remedies and doctrine of primary jurisdiction are not applicable where petitioners do not seek review of administrative ruling and could not participate in HEW review). Several courts have found *Cannon* dispositive as to exhaustion under § 504. *Pushkin* v. *Regents of the Univ. of Colorado, supra*, No. 81-1224, slip op. at 16; *Kling* v. *County of Los Angeles, supra*, 633 F.2d at 879. We are swayed by the fact that HEW has argued as amicus curiae that exhaustion should not be required as a prerequisite to private litigation under § 504. *Patton* v. *Dumpson, supra*, 498 F. Supp. at 939.

We caution that our ruling that plaintiff may proceed with her damage action under § 504 of the Rehabilitation Act is limited in two respects. First, the eleventh amendment bars the recovery of damages against certain defendants, as indicated below. Second, as to those defendants who remain in the case, we expressly reserve judgment as to whether the nature of the discrimination asserted by appellant will support a § 504 recovery. It is unclear whether defendants' treatment of Terri Ann is alleged to be discriminatory when compared with the treatment of other handicapped children, when compared with the treatment of non-handicapped children, or when measured by the obligations imposed by the Education Act.

At this stage of the case, we hold only that damages are available under § 504 as a necessary remedy for discrimination against an otherwise qualified handicapped individual. Appellant's complaint gave adequate notice to defendants that they were charged with discriminatory denial of equal access to educational facilities, in violation of § 504.

(B) The Education Act

Damages are available under the Education Act if Congress intended to provide for such relief when authorizing "such relief as the [district] court determines is appropriate." 20 U.S.C. § 1415(e)(3). We have previously been spared the necessity of deciding whether "appropriate relief" includes damages. *Monahan* v. *Nebraska,* 645 F.2d 592, 598 n.9 (8th Cir. 1981). We now join the Seventh Circuit in holding it does not. *Anderson* v. *Thompson,* 658 F.2d 1205 (7th Cir. 1981).

Although some courts have assessed the availability of damages under a *Cort* v. *Ash* analysis, *e.g., Loughran* v. *Flanders,* 470 F. Supp. 110 (D. Conn. 1979), we eschew this approach in favor of the narrower focus adopted in *Anderson, supra.* Congress has expressly created a cause of action in Section 615 of the Act and has empowered the district court to

grant "such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Accordingly, the question is simply whether damages are within the relief foreseen by Congress.

The reasoning and research of the Seventh Circuit on this point is conclusive in our view. As that court points out, Section 615 is entitled "Procedural Safeguards." The provision for suit in district court caps an entire sequence of procedures aimed at ensuring proper placements and programs for handicapped children. *Anderson* v. *Thompson, supra,* 658 F.2d at 1210-11. This context makes it clear that "appropriate" relief was generally intended to be restricted to injunctive relief, within which the district judge would have wide latitude to fashion an individualized educational program for the child. *Id.* at 1211.

The legislative history of the Education Act, like the language of the statute itself, provides little support for a damage remedy. This history has been amply set forth by the Seventh Circuit, and we find it unnecessary to restate it here. *Id.* at 1211-13. After careful independent review, we conclude that a damage remedy was not generally intended.

We depart from the Seventh Circuit's analysis, however, insofar as that court in dictum recognized two exceptional circumstances in which a limited damage award might be appropriate. These circumstances were, first, where there was a risk to the child's physical health in the program offered by the school system, and second, where the defendant acted in bad faith by failing to comply with the procedural provisions of Section 615 in an egregious fashion. *Id.* at 1213-14. *Cf. Monahan* v. *Nebraska,* 491 F.Supp. 1074, 1094 (D. neb. 1980) (tuition reimbursement available in circumstances of defendant's failure to comply with Act's procedural requirements), *aff'd in part, vacated in part,* 645 F.2d 592 (8th Cir. 1981); *Boxall* v. *Sequoia Union High School District, supra,* 464 F. Supp. at 1112 (reim-

busement for private tutor available); *Tatro* v. *Texas, supra,* 516 F. Supp. at 977-80 (tuition reimbursement available where child could not be enrolled in defendant's facilities without risk of injury).

These cases reach a result which claims our sympathies, and which may be appropriate in special circumstances. But in the present case, nothing in the record suggests that appellant bases her claim to damages on exceptional circumstances like any of those in the cited cases. Moreover, as applied to the case at bar, the rationale of the cited cases relies on legislative history which we regard as insufficient to support a general right of recovery. While Congress might well have wished to provide a right of action for dmaages in some exceptional circumstances, we entertain serious doubt that the statute itself contains warrant for a general right, and, as indicated, we find no right to damages here.

III. ELEVENTH AMENDMENT

Appellant's right to damage relief is further limited by the eleventh amendment. The district court dismissed appellant's prayer for compensatory educational services on eleventh amendment grounds. Although the court's ruling pertained only to this aspect of the relief requested, eleventh amendment immunity partakes sufficiently of a jurisdictional bar, *Edelman* v. *Jordan,* 415 U. S. 651, 677-78 (1974), that we consider its application to all defendants and claims in this case.

A. Qualification as a "State"

The preliminary question in our eleventh amendment analysis is whether various defendants share the state's immunity. The ability of a defendant to partake of the state's eleventh amendment immunity depends, at least in part, on the nature of the entity created by state law. *Mount Healthy City School District*

Board of Education v. *Doyle*, 429 U. S. 274, 280 (1977). Controlling case law holds that a county, as well as the school board of such a political subdivision, does not occupy the same position as a state for eleventh amendment purposes. *Id.; Edelman* v. *Jordan, supra*, 415 U. S. at 667 n.12. The eleventh amendment therefore does not preclude the award of damages against the Special School District of St. Louis County, the Board of Education of the Special School District, or officials of the Special School District who are sued in their official capacity.

The Missouri Department of Elementary and Secondary Education and the Missouri Department of Mental Health stand on different footing. In determining whether a state agency or department shares the state's eleventh amendment shield, the key is who will pay for any judgment rendered in favor of appellant. *Edelman* v. *Jordan, supra*, 415 U. S. at 664-65; *Jackson Sawmill Co.* v. *United States*, 580 F.2d 302, 308-09 (8th Cir. 1978), *cert. denied*, 439 U. S. 1070 (1979).

Under the Omnibus State Reorganization Act of 1974, the Missouri Department of Elementary and Secondary Education and Missouri Department of Mental Health were created as wings of the executive branch of state government. Laws 1973, 1st Ex. Sess., p.530, S.B. No. 1 As Amended; 3A Mo. Ann. Stat., Appendix B (Vernon's) (Supp. 1981). Appellant does not contest that any judgments against these departments would be paid from the state treasury.

The immunity of these two departments of the State extends to entities within the departments. Section 9(5) of the Omnibus State Reorganization Act of 1974, *supra*, 3A Mo. Ann. Stat., App. B (Vernon's) (Supp. 1981), establishes within the Department of Mental Health a Division of Mental Retardation and Developmental Disabilities. The director of the division administers various state facilities, including the "St. Louis State School Hospital." Assuming that this is the same facility as the

"St. Louis State Hospital" referred to in appellant's complaint, the Hospital and its Youth Center must obviously share the cloak of immunity which pertains to the Department of Mental Health. Appellant's complaint in Count III asserts that various defendants *"acting under the authority of the State of Missouri,* supervise, manage and maintain a Youth Center and State Hospital for the mentally imcompetent." (Emphasis added.)

The State Board of Education is similarly within the State Department of Elementary and Secondary Education, and shares its immunity. Section 5 of the Omnibus State Reorganization Act of 1974, *supra,* 3A Mo. Ann. Stat., App. B. (Vernon's) (Supp. 1981); 11 Mo. Ann Stat. § 161.012 (Vernon's) (1959).

A similar analysis applies to officials of these departments sued in their official capacity. To impute liability to these officials is not to impugn any particular officeholder, but rather the office itself. *Nevels* v. *Hanlon,* 656 F.2d 372, 377 n.7 (8th Cir. 1981), quoting *Arthur* v. *Nyquist,* 573 F.2d 132 (2d Cir. 1978); *see also Edelman* v. *Jordan, supra,* 415 U. S. at 663; *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459, 463-64 (1945).

B. Waiver

Appellant argues in the alternative that such immunity as would ordinarily pertain has here been abrogated by Congress in passing the Education Act, and by the State of Missouri in accepting federal funds under the Act. Appellant correctly points out that Congress may abrogate such eleventh amendment immunity as would otherwise apply under § 5 of the fourteenth amendment. *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976).

Abrogation of the states' immunity, however, will not be found in the absence of express, formal abrogation or persuasive legislative history. *Quern* v. *Jordan,* 440 U. S. 332, 345

& n.16 (1979). Assuming *arguendo* that the Education Act was passed pursuant to the fourteenth amendment, an intent to sweep away the immunity of the states cannot be inferred from this fact alone. *Id.* at 345. Appellant offers and we have found no evidence in the legislative history that the Education Act was intended by Congress to abrogate the states' immunity.

In addition to arguing Congressional abrogation, appellant contends that the state waived its immunity by participating in a program of federal assistance. The argument of waiver by participation, however, has been rejected by the Supreme Court. *Florida Department of Health & Rehabilitative Services* v. *Florida Nursing Home Ass'n.*, 450 U. S. 147, 150 (1981); *Edelman* v. *Jordan, supra,* 415 U. S. at 673. Waiver of immunity by a state will be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Florida Department of Health & Rehabilitative Services, supra,* 450 U. S. at 150, quoting *Edelman* v. *Jordan, supra,* 415 U. S. at 673. Appellant's argument that defendants waived their eleventh amendment defense by filing a responsive pleading is also patently without merit. *Edelman* v. *Jordan, supra,* 415 U. S. at 677-78; *Ford Motor Co.* v. *Department of Treasury, supra,* 323 U. S. at 466-67.

(C) Compensatory Services.

Appellant's final argument for reaching the state defendants is that compensatory educational services, unlike the other damages sought, are prospective and equitable in nature. Prospective, equitable relief has long been recognized as an exception to eleventh amendment immunity. *Ex Parte Young,* 209 U. S. 123 (1908); *Edelman* v. *Jordan, supra,* 415 U. S. at 664, 667-68. Such relief may be granted even when attended by fiscal consequences to the state. *Id.* at 667.

Often, as is the case here, the line between prospective and retrospective relief may not be bright. *Id.* Appellant seeks such compensatory services from the state as are necessary "to overcome the effects of any wrongful denial of special educational services." The eleventh amendment bars such services if they are a form of retroactive compensation "measured in terms of a monetary loss resulting from a past breach of legal duty." *Edelman* v. *Jordan, supra,* 415 U. S. at 668; *Nevels* v. *Hanlon, supra,* 656 F.2d at 377. On the other hand, the eleventh amendment is no bar if the relief appellant seeks can fairly be characterized as "a necessaary consequence of compliance in the future with a substantive federal question determination." *Edelman* v. *Jordan, supra,* 415 U. S. at 668.

An award of tuition reimbursement would clearly be barred as an award of damages for past breach of legal duty under this test. *Riley* v. *Ambach,* 508 F. Supp. 1222, 1248 (E.D.N.Y. 1980). We view the request for compensatory ... ices as practically indistinguishable from a request for such ... bursement. Compensatory services, like the award of a money judgment, would be measurable against past educational deprivation. The expenditure of state monies to provide compensatory services would not, in other words, ensure *"compliance in the future* with a substantive federal question determination." *Edelman* v. *Jordan, supra,* 415 U. S. at 668 (emphasis added). We conclude that the eleventh amendment bars the award of such compensatory relief as appellant has requested. *Cf. Campbell* v. *Talladega County Board of Education, supra,* 518 F. Supp. at 56 (awarding a free and appropriate public education for two years past age twenty-one against County Board of Education and State Board of Education, without consideration of eleventh amendment); *Henkin* v. *South Dakota Department of Social Services,* 498 F. Supp. 659, 667-68 (D. S.D. 1980) (holding in suit under Developmentally Disabled Assistance and Bill of Rights Act that eleventh amendment does not bar injunctive order requiring state to supply *future* payment to private facility in the amount of sum state would expend in in-state facility).

We affirm the dismissal on eleventh amendment grounds of all causes of action for damage relief asserted against the State of Missouri, its above-named departments and facilities, and officials of these departments sued in their official capacity.[11]

IV. MOTION TO AMEND

The final issue before us involves the district court's denial of appellant's motions to amend her complaint. On June 30, 1980, approximately nine months after initiating this action, appellant moved to amend her request for relief to include "such sums of money which have been expended from her resources which were not her obligation to pay, but were the obligation of the State of Missouri and its various departments and agencies." On September 11, 1980 she filed an additional motion to add her father Clyde J. Miener as a party plaintiff, asseting that Clyde J. Miener had authorized payments of insurance benefits for education-related services. These motions were made after the parties entered into a partial stipulation of settlement as to appellant's educational placement and after the district court had dismissed all claims for damages under the federal statutes and § 1983.

Since Fed. R. Civ. P. 15(a) provides that leave to amend shall be "freely given," we are always concerned with reasons for denial of proposed amendments. Defendants suggest one such

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[11]Defendants John Twiehaus, Acting Superintendent of the State Louis State Hospital, and Dr. Milton Fujita, former Medical Director of the Youth Center of the St. Louis State Hospital, are dismissed insofar as they are sued in their official capacities. The eleventh amendment does not prevent entry of an award of damages against these officials in their *individual* capacities, *Scheuer* v. *Rhodes*, 416 U. S. 232, 237-38 (1974). Given our revival of some of appellant's federal statutory causes of action, the district court may wish to reconsider the dismissal of the pendent state tort claim against these two defendants.

reason. They state that appellant withheld a known claim and asserted it only after coaxing defendants into settlement on the basis of stated claims.

This argument is facially appealing. It may be observed, however, that appellant's proposed amendments amounted to little more than an amplification of previously alleged claims but with an assertion of additional damages. Considering the late dates of the amendments, one may suspect that the district court refused to allow amendment in part because the court had already tentatively concluded, on grounds which we now reverse, that appellant had no cause of action for damages. In any case, given the limited nature of the amendments sought, it is urged that it was an abuse of discretion to refuse leave to amend. *Harkless* v. *Sweeny Independent School District,* 554 F.2d 1353, 1359 (5th Cir.), *cert. denied,* 434 U. S. 966 (1977); *R.E.B., Inc.* v. *Ralston Purina Co.,* 525 F.2d 749, 751-52 (10th Cir. 1975).

In light of proceedings subsequent to the action complained of and of the necessity of further proceedings on remand, we find it unnecessary to decide whether it was error to refuse leave to amend. We hold only that such refusal shall be considered as without prejudice to such future efforts to amend as may be appropriate on remand.

In sum, we affirm on eleventh amendment grounds the dismissal of all causes of action for damage relief and the request for compensatory services as asserted against the State of Missouri; the Missouri Department of Elementary and Secondary Education; the Missouri Department of Mental Health; the St. Louis State School Hospital and its Youth Center; the Missouri State Board of Education; and officials of these entities who are sued in their official capacity.

Our dismissal on eleventh amendment grounds of defendants Twiehaus and Fujita is limited to claims asserted against these defendants in their official capacity. Insofar as appellant asserts

a cause of action under the Rehabilitation Act against these officials in their individual capacity, and insofar as the district court may permit appellant to revive against these defendants individually her pendent state claim, the eleventh amendment presents no bar.

We similarly conclude that as to the Special School District of St. Louis County, its Board of Education, and its officials, the eleventh amendment presents no bar to damage relief. We accordingly reverse the dismissal of appellant's cause of action for damages under the Rehabilitation Act against these defendants.

We also reverse the dismissal of appellant's § 1983 cause of action as asserted against the various Special School District defendants. This claim is remanded for the district court's reconsideration in light of *Thiboutot* and in light of the questions enumerated in our discussion.

We affirm the district court's dismissal of appellant's claim to damages under the Education Act on the ground that the Act does not provide a general cause of action for damages.

Finally, we affirm as without prejudice the district court's denial of leave to amend and hold that appellant may seek to amend her complaint to assert additional damages and to add Clyde Miener as a party plaintiff, insofar as these amendments pertain to the causes of action and defendants who remain in the case. Appellant may otherwise be permitted to amend as justice may require.

A true copy.

Attest:

CLERK, U S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1981

No. 80-1971

Terri Ann Miener, etc., et al.,
Appellants,

v.

State of Missouri, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Petition of appellees for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same, be, and it is hereby, denied.

May 20, 1982

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79 - 1050 C (2)

Terri Ann Miener, etc.,
Plaintiff,

vs.

State of Missouri, et al.,
Defendants.

ORDER

(Filed January 25, 1980)

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that defendants' motion to dismiss be and is granted in part and denied in part.

IT IS FURTHER ORDERED that plaintiff's prayers for damages as to Counts I, II, and III be and are dismissed.

IT IS FURTHER ORDERED that Counts II and III, to the extent that they purport to state claims pursuant to 42 U.S.C. §1983 be and are dismissed.

/s/ John F. Nangle
UNITED STATES DISTRICT
JUDGE

Dated: January 25, 1980.

MEMORANDUM

This case is now before the Court on motions to dismiss of various defendants. This case arises out of the tragic circumstances of a young girl's serious physical and emotional handicaps and her concerned father's attempts to obtain satisfactory treatment and education. Plaintiff seeks monetary, injunctive and declaratory relief due to defendants' alleged violations of the Education of the Handicapped Act, 20 U.S.C. §1401 et seq., Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. §794, and the Civil Rights Act, 42 U.S.C. §1983. Plaintiff also seeks damages for the allegedly tortious conduct of two defendants.

Named as defendants are numerous individuals and political bodies and agencies: the State of Missouri and its Chief Executive Officer, Governor Joseph Teasdale; the Missouri Department of Elementary and Secondary Education, and its Commissioner, Arthur Mallory, and Assistant Commissioner, Dr. Leonard Hall; the Missouri Department of Mental Health, its acting Director, Dr. Beverly Wilson, and the Chairman of the State Mental Health Commission, Norman Tice; the acting Superintendent of the St. Louis State Hospital, John Twiehaus, and the former Medical Director of the Youth Center at that Hospital, Dr. Milton Fujita; and the Special School District of St. Louis County, Missouri, its Board of Education, its Directors, Allan Barclay, Gerald Braznell, and Gerald Hansen, and its Superintendent of Schools, Thomas Smith.

This suit was initially filed on August 27, 1979, and a preliminary injunction was requested. The complaint alleged that plaintiff, a seventeen year old girl, was then a voluntary resident of the Youth Center of the St. Louis State Hospital, suffering from serious physical and emotional disorders. The complaint further alleged that defendants were discriminating against plaintiff because of those disorders, in violation of Section 504 and 42 U.S.C. §1983, and failing to provide plaintiff

with a free, appropriate public education, in violation of the Education of the Handicapped Act. A pendant state claim was also alleged, claiming that defendants Twiehaus and Fujita had failed in their duty to provide a reasonably safe environment for the residents at the Youth Center, resulting in frequent physical attacks upon plaintiff by residents and staff at the Center.

It has been clear from the outset that plaintiff's father's primary concern has been to ensure that plaintiff is provided adequate treatment, education, and care. To this end, a mandatory preliminary injunction was requested which would direct the defendants to place plaintiff in the Brown School in Austin, Texas, and pay for her care there pending the outcome of this litigation. Plaintiff alleged that the Brown School was an adequate facility which had agreed to accept her as a patient, and that there were no such facilities in the State of Missouri.

This Court met with the parties on October 18, 1979. At that time it was decided that a hearing on the merits would be postponed in order to allow plaintiff to pursue the administrative remedies set out in the Education of the Handicapped Act, its accompanying regulations, and the state legislation implementing the Act. 20 U.S.C. §1401 et seq.; 45 CFR §121a.1 et seq.; and §162.945 et seq., R.S.Mo. (1979). This Court indicated that, if plaintiff was not satisfied that she was being offered an appropriate educational plan after the exhaustion of these administrative procedures, an appeal would lie to this Court pursuant to 20 U.S.C. §1415(e)(2). At that time, a preliminary injunction was deemed unnecessary because all indications were to the effect that the impetus of litigation had caused defendants to vigorously protect plaintiff's welfare.

Since that time, the parties have been before this Court on several occasions to report on the progress of the administrative process. On December 31, 1979, this Court entered an order directing that, pending the final outcome of the administrative process, the Individual Education Plan developed by the State

Hospital and Special School District personnel be implemented. Costs of this plan were to be paid on an interim basis, with a determination of ultimate responsibility to be made in the future.

It is now appropriate to deal with the numerous motions to dismiss which have been filed by the various defendants in this case. Two grounds raised by defendants will not be dealt with at this time: plaintiff's failure to exhaust administrative remedies under the Education of the Handicapped Act and the relative responsibilities of the various school districts involved. The former is moot in light of plaintiff's current utilization of the administrative process; the latter will be dealt with upon the filing of subsequent motions for summary judgment specifically addressed to this issue.

Defendants have raised numerous grounds for dismissal of portions of this lawsuit, but several key issues immediately stand out, and the resolution of these issues moots many of the remaining arguments. Plaintiff claims in Counts II and III that she has been discriminated against due to her handicapped condition with respect to access to public education and treatment. These counts raise the issues of whether Section 504 may be utilized to support a private right of action for equitable relief and damages, and, if so, whether plaintiff must first exhaust her administrative remedies.

Section 504 provides, in pertinent part, as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...

The Department of Health, Education and Welfare promulgated regulations, in effect during the times relevant to this

litigation, which implemented this statutory prohibition of discrimination against the handicapped. See 45 CFR Part 84. An enforcement scheme was set up which coincided with the enforcement provisions of Title VI of the Civil Rights Act of 1964 ("Title VI"). 42 U.S.C. §2000d et seq; 45 CFR §§80.6 through 80.11 and 45 CFR Part 81; 45 CFR §84.61. This scheme of enforcement was undoubtedly prompted by the Congressional intent that enforcement of Section 504 would be through means similar to those employed in the implementation of Title VI. *N.A.A.C.P.* v. *Medical Ctr., Inc.*, 599 F.2d 1247, 1258 (3rd Cir. 1979).

Prior to the adoption of these regulations, it was generally held that Section 504 could be enforced through a private cause of action. *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F.2d 413 (8th Cir. 1977); *Davis* v. *Southeastern Comm. College*, 574 F.2d 1158 (4th Cir.), rev'd on other grounds ____ U.S. ____, 99 S.Ct. 2361 (1979). The Supreme Court found it unnecessary to rule on this issue in the only case involving Section 504 which has come before it. See, *Davis, supra*, slip op. at 5 n.5.

The adoption of implementing regulations has cast doubt upon these holdings, however. In *Lloyd*, the court stated that, once procedural enforcement regulations were issued to implement Section 504, the private cause of action should be limited to judicial review of this administrative process. *Lloyd, supra* at 1286 n.29. See, also *Davis*, 574 F.2d at 1163 n.9. The cases which arose subsequent to the issuance of these regulations are not in agreement as to whether a private right of action still exists at all, and, if so, whether administrative remedies must first be exhausted. *N.A.A.C.P., supra; Whitaker* v. *Board of Higher Ed. of City of New York*, 461 F.Supp. 99 (E.D.N.Y. 1978). Cf. *Sherer* v. *Waier*, 457 F.Supp. 1039 (W.D.Mo. 1977); *Crawford* v. *University of North Carolina*, 440 F.Supp. 1047 (M.D.N.C.

1977); *Doe* v. *New York University*, 442 F.Supp. 522 (S.D.N.Y. 1978); *Doe* v. *Calautti*, 454 F.Supp. 621 (E.D. Pa.), aff'd 592 F.2d 704 (3rd Cir. 1979).

This Court must conclude that as far as suits to enforce Section 504 are concerned, as opposed to suits seeking damages for alleged violations of that section, a private right of action exists without regard to prior resort to administrative remedies.

The Supreme Court recently dealt with a similar issue in *Cannon* v. *University of Chicago*, ___ U.S. ___, 99 S.Ct. 1946 (1979), in which Title IX of the Education Amendments of 1972 ("Title IX"), §1681 et seq., was involved. In its analysis of the issue, the Supreme Court began with the premise that Title IX was intended by Congress to be interpreted and enforced in the same manner as Title VI. In this respect, Title IX is directly analogous to Section 504, *N.A.A.C.P., supra*, and this Court must conclude, therefore, that the decision in *Cannon* with respect to Title IX is directly applicable to the present issue concerning Section 504.

In *Cannon*, the Supreme Court held that, despite the absence of any express authoriziation in Title IX for the maintenance of a private cause of action to enforce that Title, such a cause of action should be implied. The Court also held that exhaustion of administrative remedies was not required prior to the institution of such a suit. *Cannon, supra*, slip op. at 27-29 n.41.

Title VI prohibits discrimination in federally funded programs on the basis of race, color or national origin; Section 504 extends this prohibition to discrimination on the basis of handicaps; Title IX prohibits discrimination on the basis of sex in federally funded educational programs. Complaints under all three statutes are administratively handled through the same procedures and regulations. 45 CFR §§80.6 through 80.11; 45 CFR Part 81; 45 CFR §84.61; 45 CFR §86.71. This Court must therefore conclude that the implication of a private right of ac-

tion to enforce Title IX without prior resort to administrative procedures mandates a similar conclusion with respect to Section 504. *N.A.A.C.P., supra.* See, also *University of California Regents* v. *Bakke,* 438 U.S. 265, 418-421 (1978) (Opinion of Stevens, J.), in which four justices imply a similar result with respect to Title VI.

A more difficult question is posed with respect to private actions, such as this, which, in addition to seeking the enforcement of Section 504, also seek damages for its violation. Little guidance can be found in previous cases dealing with this Section, Title VI, or Title IX. Previous cases dealing with Section 504 have either excluded any mention of the implication of a private right of action for damages, *Lloyd, supra; Andre, supra,* or have specifically disclaimed any intent to decide that issue. *Davis,* 574 F.2d at 1162; *N.A.A.C.P., supra* at 1248 n. 1. Though a few cases have dealt with this issue in the context of Title VI, the law is equally unclear with respect to that statute. See, *Bakke, supra* at 419 n.25 (Opinion of Stevens, J.); *Chambers* v. *Omaha Public School District,* 536 F.2d 222, 225 n.2 (8th Cir. 1976). Compare *Gilliam* v. *City of Omaha,* 388 F.Supp. 842 (D.Neb. 1975); *Flanagan* v. *President & Directors of Georgetown Col.,* 417 F.Supp. 377 (D.C.D.C. 1976), with *Rendon* v. *Utah State Dept. of Emp. Sec., Etc.,* 454 F.Supp. 534 (D.Utah 1978). Similarly, in *Cannon* the plaintiff's claim for damages for violation of Title IX was dismissed by the District Court, 406 F.Supp. 1257, 1259, but there is no indication that the Supreme Court dealt with this issue in its decision. ____ U.S. ____, 99 S.Ct. 1946 (1979).

The inquiry as to whether a private cause of action should be implied under Section 504 is guided by the factors enunciated in *Cort* v. *Ash,* 422 U.S. 66 (1975): 1) whether the statute was enacted for the benefit of a special class of which plaintiff is a member, 2) whether there is any indication of legislative intent to create a private remedy, 3) whether implication of such a remedy is consistent with the legislative scheme, and 4) whether

implying a federal remedy is inappropriate because the subject matter involves an area basically the concern of the States. Though all four factors are relevant, the second and third factors are clearly the most important. *Cannon, supra.* An analysis of these factors in the present context leads to the conclusion that plaintiff may not assert a cause of action for damages under Section 504.

Undoubtedly, Section 504 was enacted for the benefit of a special class of persons of which plaintiff is a member. Similarly, protection from discrimination is not an area of primary concern to the States.

> The right of participants in federally funded programs to be free from unlawful discrimination on account of race or handicap, is preeminently the province of federal, not state, law.

N.A.A.C.P., supra at 1252.

Nowhere in the legislative history of Section 504, however, is there the slightest indication that this Section might be the basis of a private damage suit. As previously mentioned, the legislative history shows an intent that the Section be enforced in the same manner as Title VI, and there is no authoritative decision allowing such damage suits under Title VI. Though there are passages in the legislative history referring to private enforcement suits, there is no such reference to damage suits, an incongruous circumstance if such suits were actually contemplated.

The implication of such damage suits would also be inconsistent with the legislative scheme. Through private enforcement suits individuals are able to vindicate their personal rights. The power to enforce the statute's non-discriminatory mandate through fiscal pressures, however, is best left to the appropriate governmental agency, which is better able to determine whether an illegal discriminator deserves the cut-off of federal funds.

N.A.A.C.P., supra at 1255 n.27. Though in a private damage suit the plaintiff is attempting to recover for his own benefit, the fiscal effect upon the defendant in such suits might likely be the same as a cut-off of funds. A recipient of federal funds might well decide to forego such assistance when faced with the possibility of liabilities approaching or exceeding the funds received. If so, the recipient might then be free to discriminate against the handicapped, or blacks or women for that matter, and everyone loses.

This Court must therefore conclude that defendants' motion to dismiss with respect to plaintiff's claim for damages under Section 504 should be granted.

Plaintiff apparently is also proceeding under 42 U.S.C. §1983 in Counts II and III, pursuant to which a damage award is allowable. It is clear, however, that a cause of action under that statute is not stated. *Sherer* v. *Waier, supra.* As in *Sherer,* the facts as alleged in the complaint do not appear to involve any invidious discrimination against similarly situated individuals. What is involved are allegations of discrimination against plaintiff because of her handicaps. Such discrimination is made illegal by Section 504, not the constitution.

A similar conclusion must be reached with respect to plaintiff's claim for damages due to defendants' alleged violation of the Education of the Handicapped Act. That Act provides specific remedies for aggrieved students and parents, and the implication of an additional remedy is not warranted. *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453 (1974). There is nothing in the legislative history of the Act to indicate that Congress favored the implication of such a cause of action, and the implication of a private right of action for damages would interfere with efforts to supply appropriate and innovative education to the handicapped. *Loughran* v. *Flanders,* 470 F.Supp. 110 (D.Conn. 1979). This Court must agree with the decision in *Loughran* that

a private cause of action for damages should not be implied. Defendants' motion to dismiss the damage claims under the Education of the Handicapped Act will therefore be granted.

These rulings should dispose of defendants' remaining arguments. All defendnats are properly before this Court due to their necessary involvement in effecting any relief that may later be found necessary. *Welsch* v. *Likins*, 550 F.2d 1122 (8th Cir. 1977), and should not be dismissed from this suit due to an alleged lack of personal involvement in the events surrounding this controversy. Defendants' remaining claims are without merit.

/s/ John F. Nangle
UNITED STATES DISTRICT
JUDGE

Dated: January 25, 1980.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79 - 1050 C (2)

Terri Ann Miener, etc.,
Plaintiff,

vs.

State of Missouri, et al.,
Defendants.

ORDER

(Filed September 19, 1980)

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that defendants' motion to dismiss plaintiff's claim for compensatory education be and is granted and that such claim be and is dismissed.

IT IS FURTHER ORDERED that Count IV of plaintiff's complaint be and is dismissed without prejudice.

IT IS FURTHER ORDERED that the motion of defendant Special School District of St. Louis County, Missouri be and is denied as moot.

/s/ John F. Nangle
UNITED STATES DISTRICT
JUDGE

Dated: September 19, 1980.

ORDER

IT IS HEREBY ORDERED that plaintiff's motion for substitution of Joe J. Winters for Norman C. Tice as a party defendant be and is granted and that Norman C. Tice be and is dismissed as a party defendant herein.

IT IS FURTHER ORDERED that plaintiff's motion for substitution of Paul R. Ahr for Beverly Wilson as a party defendant be and is granted and that Beverly Wilson be and is dismissed as a party defendant herein.

IT IS FURTHER ORDERED that Clyde J. Miener be and is recognized as plaintiff's guardian and next friend herein.

IT IS FURTHER ORDERED that plaintiff's motion for the addition of the Missouri State Board of Education as a defendant be and is granted.

IT IS FURTHER ORDERED that plaintiff's motion to amend be and is denied.

/s/ John F. Nangle
UNITED STATES DISTRICT
JUDGE

Dated: September 19, 1980.

MEMORANDUM

This case is now before the Court on the motion of the state defendants to dismiss plaintiff's claim for "compensatory education." Plaintiff brought this suit seeking monetary, injunctive, and declaratory relief due to defendants' alleged violations of the Education of the Handicapped Act, 20 U.S.C. §1401 et seq., Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and the Civil Rights Act, 42 U.S.C. §1983. On January 25, 1980, this Court dismissed plaintiff's claim for damages for violation of the above acts, finding that private actions for damages were not allowable under the Education of the Handicapped Act or Section 504, and that plaintiff had not stated a claim under 42 U.S.C. §1983. This Court upheld plaintiff's claims, however, to the extent that she sought to enforce the education of the Handicapped Act and Section 504.

On April 23, 1980, the parties entered into a stipulation of partial settlement under which plaintiff agreed to dismiss with prejudice all claims not previously dismissed by this Court, except plaintiff's claim seeking compensatory education beyond the age of twenty-one and seeking damages for defendants' allegedly tortious conduct, a pendent state law claim. The issue now presented is whether the claim for compensatory education should also be dismissed, thereby disposing of all the federal claims.

The request for compensatory education is found in the third paragraph of plaintiff's prayer for relief.

> 3. Require Defendants to provide prospective relief in the form of compensatory services to overcome the effects of any past denial of special educational services as defined by the laws of the State of Missouri and by the laws of the United States as aforesaid. Such services can and should be

> provided at the Brown School is (sic) Austin, Texas, at no cost to the Plaintiff, Clyde J. Miener. It is respectfully submitted that the proper measure of the injury to Terri Ann because of the denial of a full opportunity to education is the cost of an educational program which can restore Terri Ann to the developmental level which she would have achieved by age twenty-one (21) if Defendants had fulfilled their obligation and duty to her. The State of Missouri and its Departments of Mental Health and Elementary and Secondary Education have failed to provide the proper levels of education for Plaintiff, Terri Ann, and therefore should be found liable to restore as best can be restored at this time, the educability and learning capacity of the Plaintiff, Terri Ann.

This Court can discern no reason to distinguish the above prayer from plaintiff's prayer for damages as far as recovery under the Education of the Handicapped Act and Section 504 are concerned. Damages are meant to compensate an injured party for a past injury. Though phrased in different terms, that is exactly what plaintiff seeks in the above prayer.

Though the above prayer is not exactly clear on this point, plaintiff's briefs with respect to the instant motion indicate that she seeks an injunction forcing the State to educate her past the age of twenty-one. Had plaintiff rather sought the funds necessary to obtain a private education, there can be no doubt that the claim would be one for "damages," and therefore barred by this Court's Order of January 25, 1980. This Court does not believe the instant prayer is significantly different.

That the prayer for "compensatory education" should be treated the same as one for damages is apparent from the context in which it arises. Injunctive relief is meant to prevent the violation of some duty in the future. Ordering defendants to comply with the Education of the Handicapped would be a relevant example. Damages, on the other hand, are meant to com-

pensate a party for a past violation of some duty. Awarding plaintiff money due to defendants' violation of the Education of the Handicapped Act is an example of "damages."

Plaintiff's claim for "compensatory education" clearly should be classified as "damages." She seeks such relief not to force defendants to comply with their duties under federal law in the future, for they would so comply by providing a free and appropriate public education for plaintiff until she reaches twenty-one, but rather to compensate her for the damage done to her by defendants' past shirking of their responsibilities. That plaintiff phrases her prayer for relief in equitable terms is not significant.

Edelman v. *Jordan,* 415 U.S. 651 (1974), dealt with an analogous situation. In that case, the lower courts had awarded plaintiffs a retroactive award of monetary relief as equitable restitution, due to defendants' earlier illegal denial of benefits to plaintiffs. The Supreme Court found such an award barred by the Eleventh Amendment, even though phrased in equitable terms.

In words pertinent to the instant case, the Supreme Court said, at 668:

> ... It (the District Court decree) requires payment of state funds, *not as a necessary consequence of compliance in the future* with a substantive federal-question determination, *but as a form of compensation* to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. ... *It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.* (Emphasis added.)

As stated above, the same is true in this case. Plaintiff is seeking damages, even though not denominated as such. Plaintiff's prayer for compensatory education must therefore be dismissed in accordance with this Court's Order of January 25, 1980.

The only claim now remaining is the pendent state tort claim. The Supreme Court has said, in discussing the doctrine of pendent jurisdiction, that "[c]ertainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966). Though dismissal in the present situation is discretionary, *Kuhn* v. *Nat. Ass'n. of Letter Carriers, Branch 5*, 528 F.2d 767 (8th Cir. 1976), this Court believes that dismissal is warranted. Plaintiff's pendent state claim will therefore be dismissed without prejudice.

/s/ John F. Nangle
UNITED STATES DISTRICT
JUDGE

Dated: September 19, 1980.

APPENDIX D

TEXT OF CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOVLED

U.S. Const. amend. XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

20 U.S.C. § 1401 (1976):

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educa-

tional programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1412 (1976):

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, in-

clusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

. . . .

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

20 U.S.C. § 1414(a) (1976):

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

. . . .

(C) establish a goal of providing full educational opportunities to all handicapped children, including—

. . . .

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

. . . .

(D) establish a detailed timetable for accomplishing the goal described in subclause (C);

. . . .

(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each

school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually. . . .

20 U.S.C. § 1414(d) (1976):

Whenever a State educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section; [or]

. . . .

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

20 U.S.C. § 1415 (1976):

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or

guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local education agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

29 U.S.C. § 794 (Supp. IV 1980):

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

34 C.F.R. § 300.360 (1981):

(a) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local educational agency, if the local educational agency, in any fiscal year:

. . . .

(3) Is unable or unwilling to establish and maintain programs of free appropriate public education; [or]

. . . .

(5) Has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements of paragraph (a) of this section, the State educational agency may provide special education and related services directly, by contract, or through other arrangements.

. . . .

34 C.F.R. § 300.512 (1981):

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

34 C.F.R. § 300.600 (1981):

(a) The State educational agency is responsible for insuring:

(1) That the requirements of this part are carried out; and

(2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:

(i) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and

(ii) Meets education standards of the State educational agency (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

Mo. Rev. Stat. § 162.675 (1978):

As used in sections 162.670 to 162.995, unless the context clearly indicates otherwise, the following terms mean:

. . . .

(2) "**Handicapped children**", children under the age of twenty-one years who have not completed an approved high school program and who, because of mental, physical, emotional or learning problems, require special educational services in order to develop to their maximum capacity;

(3) "**Severely handicapped children**", handicapped children under the age of twenty-one years who, because of the extent of the handicapping condition or conditions, as determined by competent professional evaluation, are unable to benefit from or meaningfully participate in programs in the public schools for handicapped children. The term "severely handicapped" is not confined to a separate and specific category but pertains to the degree of disability which permeates a variety of handicapping conditions and education programs;

(4) "**Special educational services**", programs designed to meet the needs and maximize the capabilities of handicapped or severely handicapped children and which include, but are not limited to, the provision of diagnostic and evaluation services,

student and parent counseling, itinerant, homebound and referral assistance, organized instructional and therapeutic programs, transportation, and corrective and supporting services.

Mo. Rev. Stat. § 162.700 (1978):

1. The board of education of each school district in this state, except school districts which are part of a special school district, and the board of education of each special school district shall provide special educational services for handicapped children five years of age or more residing in the district and may provide special educational services for handicapped children under the age of five years residing in the district.

. . . .

3. Where special districts have been formed to serve handicapped children under the provisions of sections 162.670 to 162.955, such children shall be educated in programs of the special district, except that component districts may provide education programs for handicapped children ages three and four inclusive in accordance with regulations and standards adopted by the state board of education.

. . . .

Mo. Rev. Stat. § 162.725 (1978):

1. The state board of education shall provide special educational services for all severely handicapped children residing in school districts which are not included in special districts provided that such school districts are unable to provide appropriate programs of special instruction for severely handicapped children; however, this shall not prevent any school district from conducting a program for the special instruction of severely handicapped children, except that such program must provide substantially the same special educational services as would be

provided in a school operated by the state board of education and such program must be approved by the state department of education in accordance with regulations established pursuant to Section 162.685.

. . . .

3. When special districts have been formed to serve handicapped and severely handicapped children under the provisions of sections 162.670 to 162.995, severely handicapped children residing in school districts comprising the special district shall be educated in programs of the special district.

Mo. Rev. Stat. § 162.730 (Supp. 1981):

1. The state board of education shall establish schools or programs in this state sufficient to provide special educational services for all severely handicapped children not residing in special school districts or in other school districts providing approved special educational services for severely handicapped children which schools or programs shall be referred to herein as "state schools for severely handicapped children".

Mo. Rev. Stat. § 162.735 (1978):

The state department of education may assign severely handicapped children, except severely handicapped children residing in special school districts and in districts providing approved special educational services for severely handicapped children, to state schools for severely handicapped children, the school for the blind or the school for the deaf. Furthermore, the state board of education may contract for the education of a severely handicapped child with another public agency or with a private agency when the state department of education determines that such an arrangement would be in the best interests of the severely handicapped child. Assignment of severely handicapped children under this section shall be made to a par-

ticular school or program which, in the judgment of the state department of education, can best provide special educational services and such assignment shall be made upon the basis of competent evaluations; provided, however, the assignment may be appealed by a parent or guardian pursuant to sections 162.945 to 162.965. Children who are not residents of this state may be admitted to these schools if the schools have the capacity to receive them and upon payment of full tuition and costs as prescribed by the state board of education.

Mo. Rev. Stat. § 162.740 (Supp. 1981):

The district of residence of each child attending a state school for severely handicapped children, an institution providing contractual services arranged pursuant to section 162.735, or an educational program for a full-time patient or resident at a facility operated by the department of mental health, except school districts which are a part of a special district and except special school districts, shall pay toward the cost of the education of the child an amount equal to the average sum produced per child by the local tax effort of the district. The district of residence shall be notified each year, not later than December fifteenth, of the names and addresses of pupils enrolled in such schools. In the case of a special district, said special district shall be responsible for an amount per child not to exceed the average sum produced per child by the local tax efforts of the component districts. The district of residence of the child's parents or guardians shall be the district responsible for local tax contributions required by this section.

Mo. Rev. Stat. § 162.815 (1978):

In all areas of this state the voters may organize and create a special district for the primary purposes of

(1) Educating and training handicapped and severely handicapped children resident within the special district; and

(2) Providing vocational education for residents of the special district.

Mo. Rev. Stat. § 162.890 (1978):

If a special district is organized in any area of this state under the provisions of sections 162.670 to 162.955, neither the state board of education nor any school district within the special district shall be required to establish schools or classes for the training or education of handicapped or severely handicapped children under any other existing law, except that the component districts included in a newly formed special district and the state board of education shall continue to provide services formerly provided for children residing in the district until the resources of the special district are sufficient to permit its assuming such responsibilities. In no instance shall component districts or the state board of education be required to provide special education classes for the training or education of these children for more than one school term after the special district has been formed.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 79 - 1050 - C (3)

Terri Ann Miener, by and through her next friend and parent, Clyde J. Miener,

Plaintiffs,

vs.

State of Missouri, and Joseph P. Teasdale, Governor; Department of Elementary and Secondary Education of the State of Missouri, Arthur L. Mallory, Commissioner of Education of the Department of Elementary and Secondary Education of the State of Missouri; Dr. Leonard Hall, Assistant Commissioner of Education, The Division of Special Education of the Department of Elementary and Secondary Education of the State of Missouri, The Special School District of St. Louis County Missouri: The Board of Education of the Special School District of St. Louis County, Missouri; Allan G. Barclay, Gerald K. Braznell, and Gerald B. Hansen, Directors of the Special School District of St. Louis County, Missouri; Mr. Thomas E. Smith, Superintendent of Schools of the Special School District of St. Louis County, Missouri; Department of Mental Health of the State of Missouri, Mr. Norman Tice, Commissioner of the Department of Mental Health of the State of Missouri; Dr. Beverly Wilson, Acting Director of the Department of Mental Health of the State of Missouri; Mr. John Twiehaus, individually and in his official capacity as the Acting Superintendent of the St. Louis State Hospital; Dr. Milton Fujita, individually and in his former official capacity as Medical Director of the Youth Center of the St. Louis State Hospital,

Defendants.

COMPLAINT

I.

Nature of Proceedings

1. This is a proceeding for declaratory judgment as to Plaintiffs' rights, for preliminary and permanent injunction enjoining Defendants from denying Plaintiffs their rights to equal protection under the laws, including the minor Plaintiff's right to a full education under the laws of the United States, for such affirmative relief and appropriate money damages to redress the past, present and future injuries inflicted upon Plaintiffs by Defendants, who have acted and continue to act in such manner as to deprive Plaintiffs of their civil and Constitutional rights, when Defendants knew, or reasonably should have known, that their actions, within their sphere of official responsibility, would violate the constitutional, civil and statutory rights of Plaintiffs.

2. Plaintiff, Terri Ann Miener suffers from behaviorial and emotional disorders and a dimished capacity to learn as a result of recurrent brain tumors. Terri Ann, as a handicapped child, is in need of special educational programs if she is to be trained and educated to the maximum of her ability. It is possible, with an immediate undertaking of a carefully designed program, to make Terri Ann a self-sustaining adult.

3. The State of Missouri and its various agencies has a responsibility under the Education of All Handicapped Children Act, the Rehabilitation Act, and the Constitution of the United States to provide Terri Ann with an education which treats her equally with other similarly situated persons and which provides her with a full educational opportunity.

4. The State of Missouri and its various agencies have failed to provide for Terri Ann's education needs and has denied her the equal protection of the laws. This suit is brought to remedy

this situation and assure that Plaintiff, Terri Ann Miener, receives the full measure of her rights under State and Federal law.

II.

Jurisdiction

5. The jurisdiction of this Court over this action is invoked under Title 42, United States Code, Section 1983, in that Plaintiffs are being deprived of their rights as secured by the Constitution of the United States of America, and particularly under: The Fifth and Fourteenth Amendments; or as secured by Title 29, United States Code, Section 794; Title 20, United States Code, Sections 1411-1420; such jurisdiction authorized under Title 28, United States Code, Sections 2201, 2204, 1331 and 1343(3) and (4). This Court has pendent jurisdiction over Plaintiffs' claims for relief and remedy from the personal injuries inflicted upon Terri Ann Miener while in the custody of the Missouri Department of Mental Health.

III.

The Parties

6. Plaintiff, Terri Ann Miener, born May 1, 1962, is a citizen of the United States, a resident of the St. Louis State Hospital, situated in the City of St. Louis in the State of Missouri, and a domiciliary of the County of St. Louis, State of Missouri.

7. Plaintiff's next friend and parent, Clyde J. Miener, is a citizen of the United States and a resident of the County of St. Louis in the State of Missouri.

8. Defendant, State of Missouri, is a body politic and a real party at interest, and Defendant Joseph Teasdale is the Governor of the State of Missouri and its Chief Executive Officer,

whose offices are located in Jefferson City, Cole County, Missouri.

9. Defendant, Department of Elementary and Secondary Education of the State of Missouri, is a department of the executive branch of the government of the State of Missouri with its offices located in Jefferson City, Cole County, Missouri.

10. Defendant, Arthur J. Mallory, is the Commissioner of the Department of Elementary and Secondary Education of the State of Missouri, and his official offices are located in Jefferson City, Cole County, Missouri.

11. Defendant, Dr. Leonard Hall, is an Assistant Commissioner of the Department of Elementary and Secondary Education of the State of Missouri with his official offices in Jefferson City, Cole County, Missouri.

12. Defendant, Special School District of the County of St. Louis, Missouri is a body politic and political subdivision of the State of Missouri, and is a real party at interest. The St. Louis County Special School District is situated entirely within the County of St. Louis, in the State of Missouri, with offices at 12110 Clayton Road, St. Louis, Missouri 63131.

13. Defendant, Board of Education of the Special School District of the State of Missouri is the duly constituted, elected and acting governing body of said district, said district being organized, operated and administered pursuant to the laws of the State of Missouri and may be served with process by serving the clerk thereof at the Board's administrative offices at 12110 Clayton Road, St. Louis, Missouri 63131.

14. Defendant, Allan G. Barclay, is a Director of the Special School District of the State of Missouri, resides in the County of St. Louis, State of Missouri, and maintains his official office at 12110 Clayton Road, St. Louis, Missouri 63131.

15. Defendant, Gerald K. Braznell, is a Director of the Special School District of the State of Missouri, resides in the County of St. Louis, State of Missouri, and maintains his official office at 12110 Clayton Road, St. Louis, Missouri 63131.

16. Defendant, Gerald B. Hansen, is a Director of the Special School District of the State of Missouri, resides in the County of St. Louis, State of Missouri, and maintains his official office at 12110 Clayton Road, St. Louis, Missouri 63131.

17. Defendant, Thomas E. Smith, the Superintendent of Schools of the Special School District of St. Louis County, Missouri, maintains his official offices at 12110 Clayton Road, St. Louis, Missouri, and is a resident of the County of St. Louis in the State of Missouri.

18. Defendant, Department of Mental Health of the State of Missouri, is a department of the executive branch of the government of the State of Missouri and its offices are located in Jefferson City, Cole County, Missouri.

19. Defendant, Norman Tice, is the Commissioner of Mental Health for the State of Missouri and maintains his official offices in Jefferson City, Cole County, Missouri.

20. Defendant, Dr. Beverly Wilson, is the Acting Director of the Department of Mental Health of the State of Missouri, and has her official offices located at Jefferson City, Cole County, Missouri.

21. Defendant, John Twiehaus, is the acting superintendent of the St. Louis State Hospital at 5400 Arsenal Street, St. Louis, Missouri.

22. Defendant, Dr. Milton Fujita, is the former Medical Director of the Youth Center of the St. Louis State Hospital and resides in the County of St. Louis, Missouri. Dr. Fujita maintains an office at 11906 Manchester Road, St. Louis, Missouri.

IV.

First Claim for Relief:
Deprivation of Plaintiff's Right to a Full Educational Opportunity

23. Plaintiff, Terri Ann Miener, a minor of the age of 17, born May 1, 1962, is currently a voluntary resident at the St. Louis State Hospital at 5400 Arsenal Street in the City of St. Louis. Due to recurrent brain tumors and subsequent ill-effects of the surgery to remove those tumors, Terri Ann has suffered and continues to suffer from a dimished capacity for learning and has exhibited great difficulties in her emotional and behavioral development as a direct result thereof.

24. In September, 1976, Terri Ann was released from the hospital after cranial surgery and after post-operative recovery time, and was taken to Defendant, Special School District of St. Louis County, Missouri, for evaluation of her ability and capacity to be educated. The report of the Special School District's evaluation clinic, dated February 4, 1977, indicated the serious educational, emotional and behavioral disabilities of Terri Ann. A reevaluation was performed at the request of Plaintiff, Clyde J. Miener, on May 19, 1978. These reports found that Terri was learning disabled, behaviorally disordered, visually impaired and orthopedically handicapped.

25. During most of 1977, Terri Ann was placed in the Youth Center of the St. Louis State Hospital as a voluntary patient. On June 23, 1977, Terri Ann was voluntarily admitted as a full time resident at the Youth Center at the St. Louis State Hospital.

26. Terri Ann has a very limited attention span and her memory is intermittent. She demands constant attention from those persons teaching or otherwise caring for her. She is approximately four (4) years behind normal in her physical development. She is visually impaired.

27. Because of her multiple mental and physical handicaps, Terri Ann requires a one-on-one teaching environment. She needs constant reminders to stay with the task at hand, she needs continual encouragement and guidance. Terri Ann becomes anxious and disruptive when left to herself.

28. For these reasons, a highly structured learning environment is needed. She needs a continuous, supportive and warm relationship with her educators in a residential setting. She is not receiving the benefits of such a program from the St. Louis State Hospital nor the Special School District of St. Louis County, Missouri. These agencies simply do not have the time, staff, facilities or funds to provide for Terri Ann's needs. For the last three years, her education has been wholly inadequate.

29. Defendant, State of Missouri, individually and by and through its Departments of Mental Health and Elementary and Secondary Education, receives funding from the government of the United States under Title 20 of the United States Code and other authorities.

30. Under the provisions of Title 20, United States Code, Section 1411-1420, in order to qualify for assistance under the Sub-Chapter II Assistance for Education of All Handicapped Children Act [hereinafter Sub-ChapterII], a state must have in effect a policy which assures that all handicapped children are given a free and appropriate public school education. In spite of this mandate, defendant State of Missouri, and its Departments of Mental Health and Elementary and Secondary Education have failed to satisfy their duty of providing full educational opportunity for Terri Ann as required by 20 U.S.C. §1412. Under the requirements of 20 U.S.C. §1412(2)(B) a free appropriate public education must be made available to all children.

31. Under the provisions of 20 U.S.C. §§1411-1420, and the rules and regulations promulgated thereto by the Department of Health, Education and Welfare, each local educational agency

of the State of Missouri, in order to receive funds under Sub-Chapter II, must maintain records of the individualized education program (I.E.P.) of each student, and each public agency must provide special education and related services to handicapped children in accordance with that I.E.P.

32. Defendant, Special School District of St. Louis County, pursuant to the rules and Regulations promulgated under Sub-Chapter II by the Department of Health, Education and Welfare, must assure that, any placement in a public or private residential program made necessary to provide special education and related services to a handicapped child, including non-medical care and room and board, be at no cost to the parents of the child.

33. As previously stated, Defendant State of Missouri, individually and by and through its agents and departments, Defendants herein, has received funding from the Government of the United States for the financing of programs concerning the training and education of handicapped children of the State of Missouri. The State of Missouri, its Department of Elementary and Secondary Education, acting by and through Defendants Mallory, Hall, and the Special School District of St. Louis County, acting by and through Defendants Mallory, Hall, and the Special School District of St. Louis County, acting by and through Defendants Tice, Smith, Barclay, Braznell and Hansen, has failed to provide an appropriate educational opportunity for Terri Ann in that it has failed to provide appropriate residential education and treatment which is required to provide Terri Ann with a full educational opportunity as mandated by Federal statute and regulation.

34. Furthermore, according to the H.E.W. Regulations, it is the responsibility of the Missouri Department of Elementary and Secondary Education to insure that all other state agencies establish and implement a goal of providing full educational opportunity to all handicapped children in the area served by those

public agencies. Each educational program for handicapped children administered within the state, including each program administered by any non-education agencies must (a) be under the general supervision of the persons responsible for educational programs for handicapped children in the state educational agency and (b) meet educational standards of the state educational agency. The State of Missouri and its Department of Elementary and Secondary Education have failed to comply with these rules and regulations. Moreover, the Department of Mental Health of the State of Missouri by and through Defendant's Tice, Wilson, Twiehaus, and Fujita, has failed to establish and implement a program designed to provide a full educational opportunity for Terri Ann. These Defendants' actions have deprived her of her right to a full education.

35. Under the provisions of 20 U.S.C. §1415, jurisdiction is granted to the federal district courts to review matters of this nature raised by aggrieved parents following the due process hearing procedures set out in this section.

36. Plaintiffs have not exhausted the administrative hearing remedy as set out in 20 U.S.C. §1415. There are three reasons why Plaintiffs cannot exhaust the administrative remedies prior to seeking the jurisdiction of this Court.

A. Plaintiff, Terri Ann Miener, while in the custody of the St. Louis State Hospital, has been and will continue to be subject to great physical abuse and serious bodily injury as a result of the intentional assaults upon her by unknown persons at the State Hospital. She remains in great personal danger each day she remains in that facility. The delays inherent in the "due process procedure" of 20 U.S.C. §1415 will cause continued physical injury and irreparable harm to Terri Ann.

B. Plaintiff's next friend and parent, Clyde J. Miener, has made repeated requests to all Defendants herein named to properly evaluate Terri Ann, and thereby establish a proper in-

dividual education program so that Terri Ann might enjoy her rights under federal law to a full appropriate public education. Plaintiff's next friend's numerous attempts to resolve this matter through the state agencies herein named as Defendants clearly demonstrates it would be a useless and unconscionable delay to require Plaintiffs to exhaust the administrative procedures as established by the State of Missouri, in the face of the State's continual inaction. It is clear that each and every day which Terri Ann spends at the State Hospital facility and not in a proper residential placement where she can get appropriate education, irreparably damages her overall capacity to be educated.

C. Furthermore, it is clear that the due process hearing requirements set out in 20 U.S.C. §1415 are illegally and improperly implemented in the Missouri Statutes which establish the State's hearing procedure, V.A.M.S. §§162.961-162.965. These statutory procedures cause delay and do not further the aims of Sub-Chapter II in three particular, ways:

(1) The Missouri Statutes require the due process hearings are to be conducted by an improper person. V.A.M.S. §162.961(1) specifically requires the initial due process hearing be conducted by the chief administrative officer of the responsible school district. Defendant, State of Missouri has not followed the requirements of the Rules and Regulations of the Department of Health, Education and Welfare, at Volume 42 of the Federal Register, Pages 42494-96, Section 121a.507(a), which forbid hearings conducted by persons who are employees of the public agency. The chief administrative officer is clearly an "employee" of the public agency involved in the education of the child, and therefore, an improper hearing examiner.

(2) The minimal time requirements to pursue the Missouri procedure are more than twice the maximum allowable time provided in the H.E.W. Regulations. The Federal requirement under 42 Fed. Reg., Pg. 42496, Section 121a.512, requires that the agency having initial responsibility (local school district) for

the due process hearing provide a final decision within 45 days of receipt of a request for such hearing. However, under V.A.M.S. §162.950, the hearing with the chief administrative officer of the school district must be made within 30 days of notice from the aggrieved parent. The parent may then appeal to a three person panel set up by the local school district within ten days after receiving notice. After "proper deliberation" such panel shall determine whether the case warrants formal review by the Board of Education. Thereafter, upon receipt of the recommendation of the panel or upon written request of the parent, the local school board has 30 days in which to hold hearings on the matter in question, and 30 days from that hearing in which to render its opinon. Thus, the total time set out in the Missouri Statute for compliance with the due process hearing requirement of 20 U.S.C. 1415 is in excess of 100 days, far exceeding the required maximum 45 day period set out in the federal law.

(3) There is no procedure in Chapter 162 V.A.M.S. establishing a review procedure for an aggrieved parent to present his views before the State Board of Education (except in the case of cases concerning state schools, §162.962 V.A.M.S.) as required by the Rules and Regulations promulgated pursuant to 20 U.S.C. §1415 as found in Volume 42 of the Federal Register at Page 42496, Section 121a.510.

(4) For the foregoing reasons, the administrative hearing procedures set up by the Missouri Statutes do not comply with the requirements of 20 U.S.C. §§1411-1420. Moreover, the administrative hearing procedure set up by the Missouri Statutes unconstitutionally deprive Plaintiffs or their due process rights in that they create so cumbersome a procedure as to make it impossible for Plaintiffs to determine and protect their rights within a reasonable time.

Second Claim for Relief
Denial of Equal Access to Publicly Supported Education

37. Defendants, Mallory, the Department of Elementary and Secondary Education of the State of Missouri, Special School District of Missouri, Smith, Barclay, Braznell, Hansen and the Board of Education of the Special School District of St. Louis County, Missouri have established and do maintain a special school program in the County of St. Louis; that as a part of their program they provide special education services for the mentally and physically handicapped and retarded.

38. Plaintiff, Terri Ann Miener, since the beginning of the fall term of 1977, has been a domiciliary of St. Louis County, willing and able to participate in appropriate special education programs of the Board of Education of the Special School District of the County of St. Louis, and is fully eligible to participate if any should be implemented for her.

39. The above named Defendants have refused to allow Plaintiff Terri Ann Miener, to fully participate in their programs and have provided for her mere custodial care. Such refusal on the part of said Defendants is discriminatory, arbitrary, capricious, unreasonable and without just cause; Plaintiff, Terri Ann, has and will continue to sustain damages as a result thereof.

40. Such refusal of said Defendants is a denial of Plaintiff, Terri Ann's, rights to equal protection under the law and is a denial of due process of law as guaranteed to this Plaintiff by the Fifth and Fourteenth Amendments of the United States Constitution.

41. Defendants, by such refusal, are using public monies and public lands for discriminatory purposes, contrary to law.

42. An injunction should be granted enjoining Defendants and each of them from refusing to allow Plaintiff, Terri Ann

Miener, to fully participate in the programs of the Special School District of the County of St. Louis; irreparable damage has occurred and will continue to result if an injunction is not granted, for the reason that Plaintiff, Terri Ann Miener's, overall capacity to learn will diminish with each and every day of said Defendant's failure to allow said Plaintiff to participate in Defendants' special education program.

Third Claim for Relief:
Denial of Equal Access to Treatment

43. Defendants, Wilson, Tice, the Department of Mental Health in the State of Missouri, Twiehaus and Fujita, acting under the authority of the State of Missouri supervise, manage and maintain a Youth Center and a State Hospital for the mentally incompetent; as a part of their program they have established custodial wards and facilities to house the mentally incompetent, especially youths with various behavioral disorders; Plaintiff, Terri Ann, is housed in the Youth Center of the St. Louis State Hospital under the care, custody and control of aforesaid Defendants.

44. Said Defendants maintain the facilities by means of public revenues, and use public lands in supporting, maintaining and sponsoring said mental health programs.

45. Plaintiff, Terri Ann, has been a day care resident or full time resident at the Youth Center facility since June, 1977.

46. Above named Defendants have discriminatorily refused to allow Plaintiff, Terri Ann, the opportunity to be fully educationed as is her right under 20 U.S.C. §§1411-1420, and in violation of her rights under the Fifth and Fourteenth Amendments of the Constitution of the United States.

47. Aforesaid Defendants have discriminated against Plaintiff, Terri Ann, on the basis of her physical and mental han-

dicaps in violation of 29 U.S.C. §794 by their refusal to give Plaintiff, Terri Ann Miener, equal access to all facilities, all programs and in particular, the programs of education available to other persons similarly situated.

48. Such refusal on the part of Defendants is discriminatory, arbitrary, capricious, unreasonable, and without just cause; Plaintiff has suffered and will continue to suffer damages as a result thereof.

49. The aforesaid activities of Defendants constitute a denial of Plaintiff, Terri Ann's equal protection and is a denial of due process of law as guaranteed to this Plaintiff by the Fifth and Fourteenth Amendments of the United States Constitution.

50. Defendants, by such refusal, are using public monies and public lands for discriminatory purposes, contrary to law.

51. Futhermore, Plaintiff, Terri Ann, has suffered and will continue to suffer physical injury, abuse, pain and suffering as a direct result of the discriminatory activities of said Defendants who knew or should have known that their acts, constituting a denial of Terri Ann's right to equal protection of the law, would so injure her.

52. A preliminary and permanent injunction should be granted enjoining these Defendants and each of them from refusing to allow Plaintiff Terri Ann equal access to all programs and facilities of Defendants' organizations; irreparable damage has and will continue to result if an injunction is not granted, for the reason that Plaintiff, Terri Ann Miener's, overall capacity and ability to be educated will be irreparably harmed, for which there is no adequate remedy at law.

Fourth Claim for Relief:
Plaintiff Terri Ann Miener's Personal Injuries

53. During the time of her residency at the St. Louis State Hospital, Plaintiff, Terri Ann, has been the subject of attacks and beatings by her fellow residents and has also been the object of injuries suffered because of the negligent acts of the medical and custodial staff of the hospital.

54. During this time, the St. Louis State Hospital and the facility in which Terri Ann is a resident, were under the supervision and control of the Defendants, Twiehaus and Fujita. These Defendants were responsible for, and did attempt to supervise and operate the activities of the facility wherein Plaintiff, Terri Ann, resided, pursuant to V.A.M.S. §202.050.

55. It was the duty of the aforesaid Defendants to provide a suitably safe environment for the residents of the St. Louis State Hospital, one in which said residents were not subject to physical attacks or negligent injuries inflicted by the residents and staff of said facility.

56. Defendants failed to provide such a safe and secure facility.

57. Plaintiff, Terri Ann, was injured by unknown persons while a resident of the St. Louis State Hospital as a direct and proximate result of the failure of the aforesaid Defendants to provide a safe and secure facility.

58. The aforesaid Defendants acted in such a grossly negligent manner in their management and control of said facility as to place their conduct outside the scope of their official duties. Therefore, Defendants, Twiehaus and Fujita, are individually responsible the injuries inflicted upon the Plaintiff, Terri Ann Miener.

WHEREFORE, Plaintiffs respectfully pray this Court:

1. Declare §162.961-162.965 of the Statutes of Missouri unconstitutional on their face, and declare unconstitutional the acts of Defendants, their agents, employees or successors, in applying said Section in the manner as aforesaid.

2. Declare §162.961-162.965, V.A.M.S. violative of 20 U.S.C. §1415, and declare the acts of Defendants, their agents, employees or successors, in applying the provisions of these Sections to Plaintiffs as aforesaid to be violative of said United States Code.

3. Require Defendants to provide prospective relief in the form of compensatory services to overcome the effects of any past denial of special educational services as defined by the laws of the State of Missouri and by the laws of the United States as aforesaid. Such services can and should be provided at the Brown School in Austin, Texas, at no cost to the Plaintiff, Clyde J. Miener. It is respectfully submitted that the proper measure of the injury to Terri Ann because of the denial of a full opportunity to education is the cost of an educational program which can restore Terri Ann to the developmental level which she would have achieved by age twenty-one (21) if Defendants had fulfilled their obligation and duty to her. The State of Missouri and its Departments of Mental Health and Elementary and Secondary Education have failed to provide the proper levels of education for Plaintiff, Terri Ann, and therefore should be found liable to restore as best can be restored at this time, the educability and learning capacity of the Plaintiff, Terri Ann.

4. Award Plaintiffs judgment against all named Defendants, jointly and severally, the sum of Fifty Thousand Dollars ($50,000.00) for the injuries received by Plaintiff, Terri Ann, while in the custody and care of the named Defendants, by

whose actions, in depriving Terri Ann Miener of the equal protection of the laws, and depriving her of her civil and constitutional rights, grieviously injured her.

5. Issue injunctions enjoining Defendants, Wilson, Tice, the Department of Mental Health of the State of Missouri and Twiehaus, in his official capacity as Acting Superintendent of the St. Louis State Hospital, from discriminating against Plaintiff, Terri Ann Miener, by refusing to allow her equal access to all programs and facilities of said State Hospital; and issue an injunction enjoining these Defendants from enforcing any and all rules, regulations, decisions and policies which are discriminatory in nature, and which would prohibit the Plaintiff from having equal treatment as required by the law.

6. Issue injunctions enjoining the Defendants, Mallory, Hall, the Department of Elementary and Secondary Education of the State of Missouri, Smith, Barclay, Braznell, Hansen, the Board of Education of the Special School District of St. Louis County, Missouri, and Special School District of St. Louis County, Missouri, from discriminating against Plaintiff, Terri Ann Miener, by refusing to allow her to participate in the special education programs of said school district; and issue injunctions enjoining these Defendants from continuing to engage in such practices which are discriminatory in nature.

7. Grant damages against Defendants State of Missouri, Department of Mental Health, Department of Elementary and Secondary Education and Special School District of St. Louis County, Missouri, for violation of Plaintiffs' statutory and civil rights in denying to Plaintiff her rights to a full and adequate education as guaranteed by the laws of the United States in the amount of Four Hundred Seventy-Four Thousand Three Hundred Fifty-Eight Dollars ($474,358.00).

8. Award damages against Defendants, Twiehaus and Fujita, in the amount of Fifteen Thousand Dollars ($15,000.00) for the personal injuries received by Terri Ann Miener while a resident of the St. Louis State Hospital.

9. Plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited, and upon such hearing to grant such declaratory, injunctive, and monetary relief, and such other and further relief as may be just and proper in the determination of this Court.

10. Grant Plaintiffs the costs of the prosecution of this action, including but not limited to reasonable attorney's fees, suit costs and court costs.

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No. 82-61

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

and

BOARD OF EDUCATION OF THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

and

ALLAN G. BARCLAY, GERALD K. BRAZNELL, and GERALD B. HANSEN, DIRECTORS OF THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,
Petitioners,

v.

TERRI ANN MIENER, by and through her next friend and parent, CLYDE J. MIENER

and

STATE OF MISSOURI, *et al.*,

and

THOMAS E. SMITH,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No.

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SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

and

BOARD OF EDUCATION OF THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

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ALLAN G. BARCLAY, GERALD K. BRAZNELL, and GERALD B. HANSEN, DIRECTORS OF THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

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THOMAS E. SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Respondent, Terri Ann Miener by and through her next friend and parent, Cyde J. Miener submits her Statement of the

Case to correct a misstatement found in Petitioners' Brief. Their Brief presents what they would have this Court believe to be an established and proven fact, when the truth of the matter is, the Court below has made no findings of fact, this case having been dismissed prior to the admission of evidence below. Petitioners have gratuitously stated that they had limited involvement in Terri Ann Miener's education and had never refused a request to provide educational services to her. It is Respondents' position that the Special School District has indeed refused to provide educational services to Terri Ann Miener, and Respondent anticipates the opportunity to establish that fact, *in evidence,* in the trial court below.

Other than this error, Petitioners have offered this Court a generally accurate statement of the case. However, at pages 6-7 of their Brief, Petitioners do mislead this Court by intimating that the District Court decision of September 19, 1980 was as a result of Petitioners' motions. Rather, the dismissal was in response to a Motion by the State of Missouri.

SUMMARY OF THE ARGUMENT

Petitioners posit the theory that in an action under Section 504 of the Rehibilitation Act, 29 U.S.C. §794, and the Civil Rights Act of 1865, 42 U.S.C. §1983, damages cannot be awarded to a Plaintiff who also has rights under the Education for All Handicapped Children Act, 20 U.S.C. §1401, *et seq.* (EAHCA). They claim that the assumed prohibition against monetary relief under EAHCA preempts previously existing general damage remedies found under the Rehabilitation Act and The Civil Rights Act.

As will be demonstrated hereinafter, such result does not comport with the previous decisions of this Court nor does it provide a logical answer to the fitting of these remedies into a cohesive framework.

Petitioners also contend that a special public school district is entitled to share the Eleventh Amendment immunities of the state. Respondent will show that the Eighth Circuit was correct in its decision, in keeping with the decisions of this court in *Edelman* v. *Jordan* and *Mt. Healthy School District* v. *Doyle,* among other cases.

ARGUMENT

I

The Decision Of The Court Below Was Fully Consonant With Relevent Decisions Of This Court In Its Holding That Petitioners Can Be Sued For Damages Under Section 504 Of The Rehabilitation Act, 29 U.S.C. Section 794 And Under The Civil Rights Act Of 1865, 42 U.S.C. Section 1983.

Petitioners' first reason for granting the requested Writ of Certiorari is that the lower court's decision concerning the Rehabilitation Act controverts relevant decisions of this Court. For support, they cite to decisions of this Court relating to the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (1976), Section 10(b) of the Securities Act of 1933, 15 U.S.C. §77(ə), and The Civil Rights Act of 1964, 42 U.S.C. §2000e-16(c) and §2000e-3(a)(1976). The only decision of this Court cited to by Petitioners which involves the statutes at issue before the lower court is *Board of Education of the Hendrick Hudson Cent. School Dist. Bd. of Ed., Westchester County* v. *Rowley*, ____ U.S. ____, 50 U.S.L.W. 4925, June 28, 1982. However, the *Rowley* case discusses Section 1415 of the EAHCA and not Section 504. Thus, Petitioners state that the decision below controverts *relevant* decisions of this Court, without citing any cases concerning the Rehabilitation Act itself.

Moreover, Petitioners' discussion of the *Rowley* case fails to disclose how its holding on EAHCA has been controverted by the lower Court's decision on the Rehabilitation Act. While these are related statutes, both of which Respondent relied uponin her Complaint, Petitioners are wholly unable to show how the decision of the lower court controvenes the *Rowley* decision. Thus, the entire basis for Petitioners' first reason in support of their Petition for Writ of Certiorari is without support.

Looking beyond Petitioners' lack of authority, it is also clear that the logic of their argument is faulty. Petitioners state that since damages are not awardable under EAHCA that an award of damages under Section 504 of the Rehabilitation Act provides an "end run" around the EAHCA damages prohibition. Of course, the premise of this argument is that damages are not allowable under EAHCA. This was the holding of the Eighth Circuit, below, but may or may not be a proper construction of that statute. Petitioners do not invite the attention of this Court to an analysis of the basic premise of this argument, but it is clear that a determination must first be made of the availability of the damage remedy under the EAHCA before the balance of Petitioners' argument can be considered. Respondents, in their Cross-Petition for Writ of Certiorari, will address the question of damages under EAHCA. It is Respondent's position that damages are indeed awardable under EAHCA. If so, then an award of damages under Section 504 of the Rehabilitation Act is in no way inconsistent.

But assuming, *arguendo,* that damages are not available under EAHCA, it is unnecessary for this Court to find that an award of damages under Section 504 arrives at an incompatable result. Because Congress is assumed to act consistently in its legislation, seemingly conflicting statutes are to be construed to avoid an inconsistent result. BLACK, Handbook on the Construction and Interpretation of the Laws (1911), pp. 18-19. Where there are two statutes on related subjects which are apparently in conflict with each other, they should be reconciled by construction to give full validity and effect to each, if this could be done without destroying the evident intent of the drafter. *Beals* v. *Hale,* 45 U.S. (4 How.) 37 (1846). While a later-enacted statute controls in the event of an unavoidable inconsistency between statutes, even where later statutes plainly abrogate settled practice or repeal former statutes, they are to be expounded as near to the use and reason of *prior* law as can be, without violation of their intent. BLACK at 348. Therefore, a

construction of apparently inconsistent statutes which can give full effect to each is the appropriate result.

Thus, assuming that damages should not flow from EAHCA cases, there are certainly instances where damages would still be appropriate under Section 504. The Eighth Circuit believes that damages are inappropriate under a statute having the sole purpose of assuring parents and educators a procedural framework which gives them "wide latitude to fashion an individualized education program." *Miener* v. *State of Missouri*, 673 F.2d 969, 979 (8th Cir. 1982.) That statutory goal is different from that of Section 504. That Section prohibits agencies receiving federal funding assistance from *denying access* to programs to qualified person because they are physically handicapped. 29 U.S.C. §794. Instances are certainly conceivable where the acts of an education provider could go beyond the perameters of EAHCA to a point of outright denial of access. This would be an appropriate situation for the award of damages. Because there is a difference of scope and purpose in these two statutes, the duty and liability of an education provider need not necessarily be identical under each.

Thus, it can be seen that there are circumstances where the two acts which mandate compliance by educators may consistently provide different remedies. For this reason, Petitioners' argument that the lower court has enunciated inconsistent standards in construing Section 504 is unconvincing.

II

The Lower Court Correctly Applied The Principles Of Federalism Established In *Edleman* v. *Jordan* And *Mt. Healthy School District* v. *Doyle* In Its Holding That The Special School District Is Not Entitled To Eleventh Amendments Immunities.

Petitioners cite to *Edlemen* v. *Jordan*, 415 U.S. 651 (1974), which stated that one rationale for the Eleventh Amendment is

the prevention of federal judicial interference with the inner-workings of state treasuries. 415 U.S. at 663. Petitioners also correctly state that this Court has previously held in *Mt. Healthy School Dilstrict* v. *Doyle,* 429 U.S. 274 (1977), that a school district is not entitled to Eleventh Amendment immunities. 429 U.S. at 280.

Petitioners then attempt to limit *Mt. Healthy* to a legal theory not even mentioned in that decision. It is Petitioners' peception that the only reason the Mt. Healthy school district was not entitled to the State's Eleventh Amendment immunity was because the damages sought could not conceivably be paid out of the State Treasury. Petitioners state that "there is simply no mechanism by which the liability of the local school district would be transfered to the state" but offer no support for this statement whatsoever. Without support from the facts presented before the judiciary in *Mt. Healthy,* or the law therein, Petitioners arbitrarily decide that there could not have been any instance in *Mt. Healthy* where the state might assist the local school district in satisfying a judgment. This is pure speculation on Petitioners' part.

Petitioners' speculation does not stop there. Petitioners suppose that should the Special School District lack funds to provide an appropriate education for all its students as a result of their assumption of liability for violating the rights of the handicpapped, that "a general analysis of the statutes indicates that the state would become responsible for the Special District's 'severly handicapped' students." Petitioners' Petition at 22-23. Yet, by this so-called "general analysis" of the statutes, Petitioners' state that "there is no express provision applicable in the event of a determination against the Special School District under Section 1414(d) of EAHCA . . .." Petitioners go on to state that even without this express provision it is "most likely" that the financial responsibility for these severly handicapped children would "*almost* certainly be passed on

to the state . . .." Petitioners' Petition at 24 (emphasis added). Petitioners further state that in the event that the Special School District is subject to this speculative liability, that the District would *almost certainly wish* to continue providing appropriate educations of . . .", *Id.* (emphasis added). They claim without clear support that the assumed resultant shortage of funds would be borne exclusively by the severly handicapped. *Id.*

Petitioners' logic dictates that *Mt. Healthy* is only reconcilable with *Edlemen* if one assumes that, under the facts in *Mt. Healthy,* there was no possible way for the State to assist the local school district in the payment of judgments. Thus, Petitioners would argue, if they are able to envision any means, whatsoever, whereby the State of Missouri may wish to assist the Special School District in satisfying its legal obligations as a result of a Section 504 judgment, that *Mt. Healthy* and *Edlemen* would require that the Special District be entitled to an Eleventh Amendment immunity. Thereto, Petitioners track a trail through the Missouri statutes speculating as to how "it is most likely" that Petitioners liability "could be" so enormous that the state "would almost certainly" be required to make payments from the State Treasury to keep the Special School District afloat. Such speculation does not deserve consideration by this august body.

Moreover, the linch pin to the Petitioners' argument is that its suffering of any severe financial burden requires that the State assume financial responsibility *under EAHCA*. What they fail to consider is that the lower court has established a possible financial liability on the Petitioners through the Rehabilitation Act and *not* the EAHCA. Thus, Petitioners argument says that if they are liable under Section 504 for damages, and are then unable to meet their daily financial obligations, the EAHCA requires the state to pay for the shortage. As uncertain as this result is, even according to Petitioners' Brief, Petitioners would apparently see an obligation under EAHCA for the State of

Missouri to pay for *any* financial obligation imposed judicially or otherwise, on the Special School District. What the district is saying is that that EAHCA has created for them Eleventh Amendment immunities for any and all purposes. Petitioners offer no citation for the proposition that a congressionally enacted statute can create such pervasive protection for a public body by the enactment of a statute dealing with handicapped education. Respondent can find no support for such an unusual theory.

The law of this Court is clear. Under *Mt. Healthy* a local school district is not entitled to Eleventh Amendment immunity. *Mt. Healthy* creates no exception to this rule which could be applicable here. The decision of the lower court that the Special School District is not entitled to protection under the Eleventh Amendment is well founded and consonent with the holdings of this Court.

CONCLUSION

Petitioners, in their Petitioner for a Writ of Certiorari, have presented no grounds for this Court to exercise it discretionary jurisdiction to review the Eighth Circuit opinion. This opinion does not conflict with any decision of this court.

As set forth hereinabove, the remedy of monetary relief under Section 504 of the Rehabilitation Act is an appropriate result for its violation. Additionally, it would require the grossest form of speculation to perceive of a fact situation where the Treasury of the State of Missouri would be violated by a damage award of any nature against the Special School District of St. Louis County, Missouri. On these two points, the Eighth Circuit properly made its conclusions of law, charging the Special School District with the responsibility of compensating handicapped persons for the District's wrongful denial of access to their programs and activities.

For all of the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit herein should be denied.

Respectfully submitted,

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